

Appendix A

Memorandum of Understanding

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MEMORANDUM OF UNDERSTANDING
BETWEEN
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and
THE UNITED STATES COAST GUARD
*** * ***
For use of the
Oil Spill Liability Trust Fund

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1 **I. PURPOSE**

2
3 This Memorandum of Understanding (MOU) between the United States Environmental
4 Protection Agency (USEPA) and the United States Coast Guard (USCG) establishes the
5 agreement by which USEPA accesses the Oil Spill Liability Trust Fund (OSLTF or the Fund),
6 administered by the National Pollution Funds Center (NPFC), in order to carry out oil removal
7 under 33 USC 1321(c) [Clean Water Act (CWA) or Federal Water Pollution Control Act
8 (FWPCA)], with the concomitant USEPA responsibility to fully account for OSLTF funds and
9 support the NPFC's efforts to recover the Federal government's costs from responsible parties
10 (RPs). This MOU also describes the NPFC's responsibility to fully support the USEPA by
11 providing timely funding and other support to carry out oil removals.
12

13
14 **II. AUTHORITY**

15
16 This MOU is entered into under the authority of the Oil Pollution Act of 1990 (OPA), 33 USC
17 2701 et seq., as implemented by E.O. 12777 (and subsequent delegations), to carry out oil
18 removal activities under the Clean Water Act and the National Oil and Hazardous Substances
19 Pollution Contingency Plan (NCP), 40 CFR 300. OPA 6002, 33 USC 2752, makes available
20 annually a portion of the OSLTF to carry out oil removals under CWA. Subject to OPA 6002,
21 OPA 1012(a) makes the OSLTF available for the payment of those Federal costs, including the
22 costs of monitoring removal actions, that are consistent with the NCP.
23

24 Executive Order (EO) 12777 delegates the authority and responsibility for implementing the
25 provisions of Title I and various other sections of OPA, pertaining to management of the
26 OSLTF for use in removals, to the Secretary of the Department of Transportation (DOT).
27 DOT has redelegated these responsibilities to the Commandant of the USCG, who has further
28 redelegated those responsibilities to the Director of the NPFC.
29

30 The National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR 300,
31 contains details for implementing removals under OPA and the CWA, including the role of the
32 On-Scene Coordinator (OSC). Under the EO, the USEPA is responsible for removal of oil
33 spills in the Inland Zone of the US as defined in the NCP. The USCG is responsible for
34 removal of oil spills in the Coastal Zone. The USCG and the USEPA assign OSCs to direct
35 these removals.
36

37 The principal organizations within the two agencies with fiscal responsibilities for these
38 matters are the Office of Solid Waste and Emergency Response (OSWER) for the USEPA and
39 the National Pollution Funds Center for the USCG.
40
41

III. DEFINITIONS

“Oil”, is defined by section 1001 of OPA [33 USC 2701(23)] as oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act.

“Remove” or “removal” is defined in OPA 1001 (30), 33 USC 2701 (30), to mean “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”

“Removal costs”, is defined by OPA 1001 (31), 33 USC 2701 (31), OPA as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.”

IV. USES OF THE OSLTF

Before the OSLTF can be made available for removal costs, there must be an OPA incident. In Polrep-1 (or as soon as possible), the OSC shall document the following facts: that oil was discharged into, or is a substantial threat to, the navigable waters of the U.S., the adjoining shorelines, or the EEZ.

If these prerequisites are met, the OSLTF is available to reimburse the EPA via Interagency Agreements (IAGs) for removal costs resulting from their activities conducted under 33 USC 1321(c) necessitated by the OPA incident. To be reimbursable from the Fund, the removal activities which resulted in the costs being incurred must be consistent with the NCP. See Appendix 2.

V. MIXED SPILLS

The term “mixed spills” is used in this agreement to describe discharges which involve oil and other substances. This is different from “mixed events” or “mixed sites” which are terms used to describe locations where discharges of OPA oil and releases of CERCLA hazardous substances are co-located, but remain separate and distinct problems.

The substances involved in a mixed spill will dictate whether its removal may be funded by either the OSLTF or Superfund. Both funds will not be used on the same mixed substance.

1 For removal to be funded by the OSLTF, the composition of the mixture must be such that it
2 can be considered oil subject to OPA. Appendix 2 specifies criteria for selecting a funding
3 source for removal of a mixed spill.
4

5 6 **VI. ACCESSING THE OSLTF**

7
8 To initiate funding for an oil removal, the USEPA OSC must obtain a Federal Project Number
9 (FPN) and an approved project ceiling from the USCG no later than the conclusion of the
10 preliminary assessment described in the NCP, Subpart D Section 300.305, "Phase II -
11 Preliminary Assessment and Initiation of Action." See Appendix 3.
12
13

14 **VII. REPORTING**

15
16 The USEPA shall send pollution reports (Polreps) consistent with the NCP, Subpart B Section
17 300.135(m), to the NPFC. The USEPA OSC shall document the OPA incident, removal
18 activities and their connection to the incident, and resulting costs. The USEPA will also
19 provide status reports in accordance with current NPFC reporting requirements, as detailed in
20 Appendix 4.
21
22

23 **VIII. COST DOCUMENTATION**

24
25 The USEPA shall provide full and timely documentation of all costs, both reimbursable and
26 non-reimbursable, in every case to support reimbursement of the USEPA and to support
27 recovery of costs from the responsible parties and other liable persons. USEPA OSCs shall
28 also review all costs incurred during the removal operation and certify that they are proper and
29 consistent with the NCP. In lengthy or cost intensive cases, the USEPA will provide interim
30 documentation to enable the NPFC to bill the RP(s) and start the interest clock for monies
31 owed to the government. See Appendix 5.
32
33

34 **IX. PROPERTY & EQUIPMENT PURCHASES**

35
36 The OSC may use OSLTF funds for purposes deemed necessary for an oil removal. This
37 includes the purchase of non-consumable property and equipment when operational necessity
38 dictates it or when it is clearly cost effective for the government. If the total acquisition is not
39 exclusively for oil removal, other funding sources must be applied in appropriate proportion.
40 The OSC has custody of such property and equipment, and must dispose of it in accordance
41 with NPFC guidance. Following the conclusion of a removal, all property and equipment not
42 consumed must be inventoried and reported in the case documentation. To avoid the need for
43 disposal, equipment should be leased whenever possible. See Appendix 6.
44

1 **X. DESIGNATION OF SOURCE & CLAIMS**

2
3 USEPA OSCs will make reasonable efforts to promptly determine the source of the oil
4 pollution and, when it involves a vessel or facility, to identify any potential RPs, and will
5 provide the information to the NPFC case officer. OPA 1014, 33 USC 2714, requires
6 designation of source(s), where possible and appropriate, and requires notification of the
7 responsible parties (RPs) to initiate the claims process. USEPA OSCs have not been delegated
8 the authority to formally designate sources for purposes of claims advertising OPA. See
9 Appendix 7.

10
11
12 **XI. BILLING**

13
14 To obtain reimbursement for eligible costs, USEPA will present billing documentation
15 supported by case documentation to the NPFC. See Appendix 8.

16
17
18 **XII. CONTRACTING.**

19
20 The USEPA and the USCG will provide contracting support to OSCs to enable them to obtain
21 commercial services needed to conduct removals. The agencies will make these resources
22 available according to agreements and procedures in Appendix 9.

23
24
25 **XIII. COST RECOVERY AND LITIGATION SUPPORT**

26
27 USEPA shall fully support NPFC with respect to all USEPA uses of OSLTF funds following
28 removal activities when NPFC proceeds to recover the Federal Government's removal costs
29 from the RP(s).

30
31
32 **XIV. MODIFICATION AND TERMINATION**

33
34 Either the USCG or the USEPA may propose changes to this MOU. Both agencies must
35 approve a change before it becomes effective. Either agency may terminate the MOU by
36 giving a thirty (30) day advance written notice to the other Agency. Adding or changing
37 appendices or attachments does not constitute modification of the overall MOU. Such
38 additions or changes may be made by agreement of officials responsible for the specific
39 subject area in the USEPA and USCG. The officials making any such change shall
40 immediately bring the change to the attention of the signers of this MOU, or their successors,
41 and then shall disseminate a notice of the change so as to inform all users of the MOU.

XV. PERIOD OF AGREEMENT

This MOU shall continue in effect until terminated, modified or amended. This MOU shall become effective on the date of the last signature below.

XIV. SIGNATURES

_____/s/_____

Date_____

Daniel F. Sheehan
Director
National Pollution Funds Center
United States Coast Guard

_____/s/_____

Date_____

Elliott P. Laws
Assistant Administrator
Office of Solid Waste and
Emergency Response
U.S. Environmental Protection Agency

_____/s/_____

Date_____

William H. Campbell
Director of Finance and Procurement
United States Coast Guard

_____/s/_____

Date_____

Harvey B. Pippen, Jr.
Director
Office of Grants and Debarment
U.S. Environmental Protection Agency

_____/s/_____

Date_____

Betty L. Bailey
Director
Office of Acquisition Management
U.S. Environmental Protection Agency

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APPENDIX 1. NPFC USER REFERENCE GUIDE

NPFC publishes the NPFC User Reference Guide. It addresses for OSCs the use of the OSLTF and Superfund, along with applicable regulations and background information. Due to its extensive nature, the material is published separately as a Supplement to the Marine Safety Manual. It can be obtained by contacting the NPFC's Customer Service Division at (703) 235-4709. To assure that the Guide is available where needed, the USEPA will annually provide NPFC a list of HQ and Regional organizations that employ or support OSCs. The list shall include the address and NPFC will supply each with a copy of the Reference guide and updates as necessary. The Reference Guide is divided into a series of topics briefly explained as follows.

- A. Organizations Using Pollution Funds.** This provides information on entities able to access the Funds managed by NPFC and includes Federal Agencies, States and Trustees.
- B. Introduction to NPFC.** This describes the origins, roles, missions, case teams and regions, functional contacts, and frequently used acronyms.
- C. Removal Actions.** This provides procedures for accessing the Funds for Clean Water Act and CERCLA removals. It includes OSC financial management checklists, guidance on mystery spills, ACP guidance, and reports. The Technical Operating Procedures (TOPS) for Removal Costs and the TOPS for Resource and Cost Documentation are included in this chapter.
- D. Investigative Considerations.** This addresses liability limits, proximate cause, designation of source, notification and advertising, and potential responsible parties.
- E. State Access.** This includes the State Access TOPS and the State Access regulations issued under OPA, Section 1012(d)(1). It also addresses procedures for requesting funds, removal costs, pollution reports, payment, litigation, and cooperative agreements.
- F. Natural Resource Damage Assessments.** This includes the NRDA/Initiate TOPS which contains initiation criteria, purchase of property, reporting, and requests for reimbursement.
- G. Claims.** This includes the Claims regulations and the Claimant's Information Guide, which explain compensation available, filing a claim, notice of designation, advertising, and the settlement process.

APPENDIX 2. USES OF THE OSLTF

The OSC may use the OSLTF for the payment of incident-specific removal costs, which includes the cost of monitoring removal actions by responsible parties and others. This includes all costs directly related to specific removals, including administrative, operational, and personnel expenses. The costs are both extramural and intramural, as defined below.

A. Extramural Costs. Extramural costs are those costs incurred external to the USEPA: contractor/vendor, other government agencies, etc. See Appendix 8 for contracting mechanisms to obtain extramural services. Examples of extramural costs include, but are not limited to, the following:

1. Contractor and consulting costs, including lease or rental of equipment supplied by a removal contractor or subcontractor.
2. Supplies, materials and equipment (including transportation costs) procured, leased or rented for the specific removal activity.
3. Reimbursement of allowable costs incurred by other Federal agencies (e.g., U. S. Army Corps of Engineers), or State or local governments. An Interagency Agreement (IAG) between USEPA and another federal agency supporting a removal action is an extramural cost.
4. Other incident-specific obligations or purchases of services used in conducting removals.

B. Intramural Costs. Intramural costs include internal costs incurred by the USEPA directly in support of removal activities. Intramural costs include:

1. Travel and per diem for USEPA personnel.
2. Salaries for USEPA personnel not normally available for oil spill removal, as well as overtime hours for all personnel. USEPA determines who is not normally available for oil spill removal.
3. Supplies used in support of a removal activity.
4. Charges for use of equipment and resources owned by the USEPA.
5. Replacement, repair, renovation or cleaning of USEPA equipment (including consumables) due to unavoidable oiling normally inherent in conducting removal.

C. Mixed Spills. (To be developed)

APPENDIX 3. FUNDS TRANSFERS, FPN & CEILING

- A. Multi-Incident IAG.** Annually, the NPFC will execute an IAG with USEPA to transfer funding from the OSLTF to USEPA to support the activities of USEPA in conducting oil removals. The funding is for incident specific costs. The USEPA accounting and financial data systems shall track expenditures and provide documentation to support subsequent cost recovery actions by the NPFC. The signed IAG will be delivered to EPA no later than October 1 of each year.
- B. FPN.** The OSC must contact the appropriate Coast Guard District Office and obtain an FPN and a ceiling for each incident no later than the conclusion of the pre-assessment phase (NCP Subpart D, Section 300.305, Phase II - Preliminary Assessment and Initiation of Action”).
- C. Ceiling Categories.** The following are the categories of costs funded by the OSLTF under an FPN and ceiling. The OSC is required to keep the costs in items (1), (2), and (3) within the approved ceiling.
1. Incident specific obligations and other costs to date, such as purchases or contracts for services.
 2. Incident specific USEPA reimbursable costs recorded in the USEPA accounting system (such as travel, per diem, overtime, plus salaries for personnel not normally available for oil spill response - USEPA determines who is not normally available for oil spill response.).
 3. Incident specific costs for all other Federal Agencies (e.g. NOAA, DOI-FWS, etc.) including obligations and costs recorded in the Coast Guard accounting system (Strike Team assistance costs, equipment, etc.).
 4. Incident specific salary costs of personnel who are normally available for oil spill response. These costs are recoverable from the Responsible Party (RP) but not reimbursable from the OSLTF.
- D. Incident Specific IAG.** For certain removal actions, an Incident Specific IAG may be the preferred funding mechanism. In that case, the OSC will still obtain an FPN and ceiling from the appropriate Coast Guard District Office and start the removal. The OSC/USEPA Region and the NPFC will then negotiate the IAG.
- An Incident Specific IAG can support better management when: removals are lengthy; large ceilings are involved; multiple agencies are involved; a chosen contracting mechanism introduces complexities, or some other condition requires extra management attention. The OSC and the NPFC should both consider the use of an incident-specific IAG under the following conditions:
1. The OSC estimates that an additional \$100,000 or more will be required after the first anniversary of the opening of the removal (issuance of the FPN). (Case

ceiling would be at least \$100,000 plus costs incurred in the first 12 months of removal.)

2. The OSC estimates that the removal will continue past the second anniversary of the FPN, i.e., into the third year of removal.
3. Any case that involves improvements to real property. The case officer can assist in determining what is considered an improvement.

E. Long Term Removals. If one or more of the conditions identified in Section D, above, occurs, then the following requirements apply:

1. **FINANCIAL PLANNING.** The OSC shall submit a Long Term Removal Plan to NPFC containing all resource considerations relating to the removal project from its inception to completion, including disposal of all real and personal property procured for the removal. If improvements to real property are involved, the Plan shall contain, at a minimum, a description of the removal system including components and system operation, initial setup costs, annual recurring costs, annual non-recurring costs, termination costs and other costs. The Plan shall list these cost categories by federal fiscal year. The Fund may be used to purchase fixtures for real property if this is the only cost-effective way to effect a removal; however, this does not eliminate other requirements concerning real property acquisitions, particularly using/taking non-RP property without due process of law.
2. **REAL PROPERTY -- ADVANCE PLANNING FOR DISPOSAL.** If improvements (long term facilities) are constructed on real property, the OSC must document the improvements to support cost recovery and potential litigation and to facilitate disposal upon closure. When the time for disposal arrives, records should be available to show purchase costs, accurate descriptions of structures and installed equipment, understandings or arrangements made in advance with any other parties, title holder to the property involved at the time the improvements were installed, and any other information needed to dispose of the specific type of improvement involved.
3. **SEPARATE IAG.** A long term removal can not be charged to a multi-incident IAG. The OSC must immediately notify NPFC so that the removal can be funded under an incident-specific IAG. The initial amount provided in an IAG will normally be the amount needed for the first 12 months. The NPFC will provide continued funding, through annual amendments, for long term actions that are consistent with the NCP and within the scope of the Long Term Removal Plan.
4. **ANNUAL ADMINISTRATIVE CYCLE.** At every twelve month anniversary of the removal project, the Long Term Removal Plan shall be reviewed and updated to show all actual costs to date and current best estimates of future costs, as well as changes in the nature of the spill or the technology being employed. Based on this information, the OSC should request additional ceiling in the amount needed for the next 12 months and initiate an amendment to the IAG.

APPENDIX 4. REPORTING AND COORDINATION

It is essential that the NPFC Case Officer be kept informed about the financial progress of a removal. Polreps are a logical and effective way to accomplish this. Every Polrep should show the financial status of the removal: current ceiling, obligations to date, an estimate of all other costs to date (see Appendix 2-D, above), and any other facts or figures that explain the current status or have value for planning subsequent activities. In the event that the OSC has no reason to generate Polreps, the need to keep the Case Officer informed is not diminished, and the OSC must convey the financial status information by some other kind of written communication.

The OSC is encouraged to contact the NPFC case officer if questions arise concerning the financing or documenting of a case. This may include agreements to fund participation by other government agencies, documentation of sources and identification of responsible parties, and special considerations for billing responsible parties. The OSC and the case officer will work together to find solutions that are in the best interest of the government.

At the conclusion of a removal, the USEPA OSC shall submit a termination or closure report to the NPFC Case Officer and shall also send a copy to the USEPA Cincinnati Financial Management Center (CFMC). The report shall contain an estimate of the total cost for the project, with reasonable allowances for uncertainty, and a request to reduce the project ceiling to that amount, thus releasing the balance for use elsewhere. There is no need for the full identification of RP(s) and address(es) unless they were not provided previously. This can be a Final Polrep or other written communication as above. If not a Polrep, a copy of the report must be sent to the USCG District (m) Office from which the FPN was obtained, in addition to the NPFC Case Officer.

APPENDIX 5. COST DOCUMENTATION

To support cost recovery, documentation of all removal costs incurred as a result of an incident is required. These costs are recoverable from the responsible party. Some of these costs are also reimbursable to USEPA from the OSLTF. These include costs for personnel who are not normally available for oil spill response (whose USEPA fixed account number is not for oil), premium pay (overtime, hazardous duty pay) for all personnel working at an incident, travel vouchers, contractor invoices, contractor cost letter reports, and any other charges related to an incident which have been charged to the reimbursable account number. Costs that are recoverable, but not reimbursable, include personnel normally available for oil spill response (under a USEPA fixed account number for oil), contractor invoices and all other costs associated with an incident but not charged to the reimbursable account.

A. Incident-Specific Documentation. The USEPA OSC shall produce a comprehensive written record supporting all expenditures and costs incurred in each removal. This documentation will support reimbursement of USEPA costs and NPFC's cost recovery on behalf of the OSLTF. Upon request of the OSC and contingent upon availability, a case officer will go to the scene of a removal and assist the OSC with documentation. USEPA may use: (1) the standard resource documentation procedures available from the Case Officer; or (2) alternative documentation that provides the following:

1. USEPA Personnel Costs. USEPA agrees to charge actual USEPA personnel labor costs for all USEPA personnel participating in an incident specific removal. Documentation must show each employee's name, grade, hours, appropriate subtotals and an overall total. Also included is the name and telephone number of the appropriate USEPA official to contact for additional information, if not the OSC. USEPA must include a copy of the Payroll Distribution Timesheets (EPA Form 2560-28) for all pay periods identifying the site/FPN and incident specific hours chargeable for each participating employee and a document showing payroll hours by pay period for all hours applicable to the incident. (NOTE: Timesheets and payroll reports must be redacted to remove data protected by the Privacy Act such as social security numbers, etc.)
2. USEPA Personnel Travel Costs. All incident specific travel costs must be documented. This shall include a summary indicating the employee's name, Travel Authorization (TA) number, amount, employee subtotal and overall incident total. Documentation must include copies of each TA, liquidated Travel Vouchers and expense receipts as required of the traveler. (NOTE: TA's, Vouchers and receipts must be redacted to remove data protected by the Privacy Act such as social security numbers, etc.)
3. Other USEPA Costs. Documentation for costs of USEPA vehicles and other government owned equipment shall contain a description of the item, unit of use (i.e. per hour or day, etc.), applicable rate and the total charge. Government owned equipment utilization is recorded on a daily basis.

- 1 4. Contractor Costs: USEPA shall document contractor costs for all incident
2 specific contractor related response costs.
3
- 4 (a) A cover sheet shall contain site name and FPN, the applicable Tasking
5 Document Number(s), date(s) of contractor work performance, labor
6 costs, travel costs, contractor purchases, G&A, overhead, base and award
7 fee (if appropriate), total invoice amount and a brief description of the
8 contractor activity performed under the Tasking Document(s);
9
- 10 (b) Copies of each Tasking Document and any amendments for contractor
11 related response activity for the site. For each Tasking Document
12 Number, the record shall contain daily line item detail by person for all
13 contractor personnel participating in response activity under that Tasking
14 Document;
15
- 16 (c) Copies of all contractor billing statements which enumerate the final
17 cumulative direct costs by applicable Tasking Document Number with the
18 applicable line items underlined. For contracts that are billed in summary
19 amounts, USEPA shall provide a report of the tasking documents and
20 associated costs to support the amount billed. (NOTE: If the cumulative
21 cost totals for any Tasking Document Numbers listed on the billing
22 statement are not the final costs, the contractor cover sheet must clearly
23 state this with an estimate of anticipated additional costs and the expected
24 date of completion. If there are any adjustments to the actual contractor
25 payment, the cover sheet must state the Tasking Document Number and
26 the actual amount paid).
27
- 28 (d) For each person, the daily line item detail shall include the employee
29 name, job title, professional level or hourly rate and hours;
30
- 31 (e) Line item detail shall record any other applicable contractor costs, such as
32 equipment rentals and purchases of supplies. Equipment rented for a
33 period of time can be recorded once, provided the line item clearly
34 indicates the time period.
35
- 36 5. Documenting Contractor Costs for USCG Basic Ordering Agreements (BOAs).
37 When the USEPA contracting officer places orders against USCG BOAs,
38 contractor cost documentation requirements stipulated in the USCG BOA shall
39 apply. The USEPA OSC, or the USEPA OSC's authorized representative (who
40 must be a federal employee) signs each daily contractor cost report. BOA
41 contractor invoices are sent directly by the USEPA OSC to the servicing USEPA
42 contracting officer. A copy of each OSC-certified invoice must be retained in the
43 required documentation. See Appendix 8.
44

- 1 6. Status Reports. The NPFC will assemble a complete set of the Polreps and other
2 status reports submitted by the USEPA OSC and incorporate them into the cost
3 documentation package.
4

5 **B. Other Government Agency Costs:** USEPA may use a Pollution Removal Funding
6 Authorization (PRFA) or other agency agreement to employ another government agency
7 in a removal action.
8

- 9 1. USEPA shall obtain cost documentation from other government agencies (federal,
10 state and local) participating in a removal under the auspices of a USEPA OSC in
11 accordance with the requirements specified in any applicable USEPA/Other
12 Agency agreement (i.e., IAG, Cooperative Agreement, letter contract, etc.).
13 When USEPA uses an Other Agency agreement, USEPA will obtain
14 reimbursement from the OSLTF and will reimburse the other agency.
15 2. A USEPA OSC may, at his or her discretion, use a Pollution Removal Funding
16 Authorization (PRFA), as described in NPFC Technical Operating Procedures for
17 Standard Cost Documentation (TOPS), in lieu of the agreement mentioned above.
18 In the absence of a USEPA/Other Agency agreement, a PRFA will be executed.
19
20 3. If the OSC requests assistance from the NPFC in executing a PRFA, the NPFC
21 may authorize reimbursement directly to the other agencies from the OSLTF.
22 The USEPA OSC must assure that the correct USCG accounting data is entered
23 on the PRFA and that a copy is sent to the NPFC for this type of transaction to
24 work properly. PRFAs are intended to be issued by the OSC pursuant to
25 instructions contained in the NPFC Technical Operating Procedures (TOPS) for
26 Resource Documentation. When USEPA issues a PRFA, other agency
27 reimbursements will be processed in accordance with the TOPS.. Assistance in
28 the use of PRFAs may be obtained from the NPFC Case Officer.
29
30 4. Cost documentation provided by other agencies shall include:
31
32 (a) Copies of tasking documents issued by the OSC which describe the
33 equipment or services provided by the other agency;
34
35 (b) Copies of records detailing work performed, travel, labor, equipment and
36 any additional items used, with unit costs and subtotals for each category,
37 and an overall reimbursable total.
38

39 **C. Oil & Gas Well Site Specific Costs.** Costs for each well in a field or cluster treated in
40 a removal project funded under a single FPN must be documented separately. Direct
41 costs not attributable to a specific well must be allocated on a consistent basis against all
42 wells subject to removal activity in any such project with combined funding. The
43 resource documentation for the project must include: all costs for each individual well;
44 the method of allocating each category of direct allocable costs; and the identity of the
45 prospective responsible party or parties associated with each well. Examples of direct
46 well site costs include, but are not limited to the following: removal of production tubing,

casing, well head assemblies, or gathering lines; plugging; grading and restoration of surface well site terrain (including treatment of contaminated soil); and construction and removal of temporary access. Examples of direct costs not attributable to a specific well, which must be allocated, include: treatment of contaminated soil or water not associated with a particular well; removal of central field storage tank batteries and heater treaters, compressors, dryers, etc.; closure of waste oil pits; disposal; and OSC authorized miscellaneous purchases, administrative, travel, and monitoring costs, including technical assistance contractor costs, if any.

- D. USEPA Documentation Custodian & Point of Contact.** USEPA shall retain the entire documentation package until such time as NPFC Case Officer requires it to support negotiation or litigation following billing. The holder of the completed files shall be the USEPA Regions. CFMC bills the USCG for reimbursement from the OSLTF and must hold complete billing documentation inclusive of all adjustments to calculate the correct reimbursement amount and support it.

In the event of a challenge to the removal cost documentation records following billing, the NPFC Case Officer may request additional documentation from CFMC for resolution with a copy of the request to the OSC.

- E. Timely Submission of Documentation.** To support prompt billing of the responsible party (RP), documentation of costs is required at NPFC not later than 90 days following receipt of contractor invoice of costs and/or receipt of payment of EPA travel vouchers. The cognizant EPA official shall advise the NPFC if a delay is expected, the reason for the delay, and the date the documentation will be provided.

Six months from initiation of the removal action and every six months thereafter until site completion, the OSC must assemble an interim cost documentation package and forward copies to the CFMC and NPFC. The cost documentation package will contain all of the elements described in the Cost Documentation Appendix.

- F. Documentation Retention Period.** The USEPA agrees to retain all cost documentation for a minimum of six years following completion of incident removal activity unless otherwise advised by the NPFC. USEPA must retain only that cost documentation which was not forwarded to the NPFC under section VII of this agreement.

- G. USEPA Indirect Cost Model.** The USEPA agrees to develop an indirect cost model that will support USEPA reimbursement of all indirect cost expenditures. The USEPA shall coordinate this project with the NPFC at reasonable intervals to assure that it will support cost recovery actions against RPs.

- H. Forensic Documentation.** When the source of an oil spill is in question, the OSC may use forensic laboratory analysis to compare the spilled oil with suspected sources. The OSC must employ sampling collection and handling procedures that assure uncontaminated samples and an unbroken chain of custody from collection through

1 analysis. The forensic process should be able to withstand challenge in court to be of
2 value in cost recovery.
3

4 The USEPA OSC may use the Coast Guard Marine Safety Laboratory in Groton,
5 Connecticut, or other labs that are approved under the USEPA Contract Lab Program
6 (CLP) and shall provide, if necessary, expert testimony in cost recovery litigation.
7
8
9

APPENDIX 6. PROPERTY & EQUIPMENT PURCHASES

- A. Buy Vs. Lease.** All property purchased with OSLTF funds under an incident-specific FPN remains property for which the NPFC has a fiduciary interest. OSCs should only purchase property with OSLTF funds when operational necessity directly related to a removal dictates or when it is clearly more beneficial to the government than leasing. Otherwise, leasing is the preferred choice. When making decisions to buy versus lease property, and operational conditions permit, OSCs should factor in the costs necessary for acquisition, maintenance and disposal/disposition of the property. Many of these considerations can be addressed in the planning process before a spill occurs. Documentation of the factors considered in purchasing property during a spill are critical in cost recovery and litigation and shall be documented to the greatest extent possible. OSCs should be aware that property purchased to support a removal will be billed to the responsible party at 100% of the cost. Accordingly, the OSC should provide the responsible party the opportunity to purchase or otherwise directly supply the property needed. Upon completion of the removal, any property provided by the responsible party shall be transferred directly to the responsible party.
- B. Disposal and Property Records.** All property purchased with OSLTF funds must be accounted for in the cost documentation. However, not all OSLTF purchased property requires documented disposal/disposition. For example, all consumable items are considered expended during the removal activity. Therefore, consumable property remaining at the completion of removal action only requires cost effective disposal/disposition. Lots of consumable property having a cost in excess of \$1,000 shall be treated as non-consumables. The USEPA shall retain documentation or evidence of disposal/disposition action taken for all non-consumable property and consumables in lots worth more than \$1,000. Non-consumable property includes items costing over \$1,000 and items of lower cost but high interest (e.g., radios, FAX machines, cellular phones, computers, pagers, copiers, photographic equipment, protective clothing, test equipment, etc.).
- C. Defense Reutilization & Marketing Office (DRMO).** To properly dispose of non-consumable property, the OSC shall use the closest Defense Reutilization and Marketing Office (DRMO). Transportation costs associated with disposal/disposition of property may be charged to the FPN. The DRMO usually requires a form DD-1348 for each group of like items. Where the form requests a Department of Defense Activity Address Code (DODAAC), use "Z74100."
- D. DRMO & Property Survey Records.** The OSC shall forward copies of DD-1348(s) to the NPFC in the billing summary and case completion report following completion of the removal. A copy shall also be placed in the complete case file. Lost property, stolen property, and damaged property that is not suitable for transfer to a DRMO must be surveyed in accordance with federal property management guidelines. A copy of the survey report must be forwarded to the NPFC case officer in the billing summary and case completion report, and a copy shall also be placed in the complete case file.

- 1 **E. Real Property.** The Fund may be used to make improvements to real property if it is
2 the necessary or the cost-effective way to effect the removal; however, this does not
3 obviate other requirements pertaining to real property acquisitions, particularly taking
4 and compensation issues. Upon completion of the cleanup, removable fixtures should be
5 disposed of in the same manner as personal property purchased with OSLTF funds (see
6 Appendix 6); permanent improvements to real property should be removed, abandoned or
7 excessed, as appropriate, as permitted by the ownership of the real property.
8
- 9 **F. Additional Information.** If questions should arise about property or related issues,
10 such as DRMOs, the OSC should call the case officer.

1
2
3 **APPENDIX 7. DESIGNATION OF SOURCE & CLAIMS**
4

5 OPA requires where possible and appropriate that the source of each discharge or substantial
6 threat of discharge be designated and the RP notified. Subpart B of the NCP section
7 300.135(c) states that “the OSC shall, to the extent practicable, collect pertinent facts about the
8 discharge or release, such as its source and cause; the identification of potentially responsible
9 parties; the nature, amount, and location of discharged or released material; the probable
10 direction and time of travel of discharged or released materials; ... the pathways to human and
11 environmental exposure...”; etc. The NPFC is responsible for claims and will notify the RP for
12 USEPA incidents following receipt from the USEPA OSC of the RP’s identity and address
13 (including, as appropriate: telephone, telex, and fax numbers; resident agents or agents for
14 service of process; those authorized to speak and act for the RP in this situation, particularly
15 when the RP is an organization, and how they can be contacted; tax ID numbers; and any other
16 information concerning RP organizational structure(s) which could assist the case officer).
17 The USEPA OSC shall scope out the potential for third party claims arising out of the incident.
18 The OSC shall promptly make this information available to the NPFC Case Officer to support
19 the evaluation of the impact of claims, as well as enabling designation and notification. Upon
20 request of the OSC and contingent upon availability, a claims officer will go to the scene of a
21 removal to assist the OSC in evaluating the potential for claims and in identifying sources and
22 potentially responsible parties.
23
24
25

APPENDIX 8. BILLING

A. The Billing Process. The USEPA OSC must submit all financial documentation to CFMC for verification and final adjustments. CFMC shall submit a preview copy of the Billing Summary to NPFC for validation of costs to be billed. Once agreement between CFMC and NPFC has been reached on the total amount to be billed, CFMC will initiate reimbursement. CFMC will use the U.S. Treasury's On-Line Payment And Collection System (OPAC) to send the total bill for reimbursement directly to the USCG Finance Center in Chesapeake, Virginia (ALC = 69-02-5102). As part of the same action, CFMC shall send (by mail or fax) a copy of the Billing Summary to the NPFC at the following Address:

National Pollution Funds Center (cm)
4200 Wilson Boulevard, Suite 1000
Arlington, Virginia 22203-1804

(703) 235-4837 fax

B. Billing Summary. The Billing Summary is based on supporting documentation for all recoverable costs, including both reimbursable and non-reimbursable. The Summary must contain a line item showing the total dollar amount for each of the major categories of costs:

1. USEPA Personnel
2. USEPA Travel
3. Contractors (list each separately)
4. Other Government Agency Costs (list each separately)
5. Marine Safety Lab
6. Miscellaneous

The Summary should also provide explanations for any unclear elements or issues.

C. Timetables. The preview copy of the Billing summary must be received by NPFC not later than 90 days following the OSC's receipt of contractor invoice(s) and/or payment of USEPA travel vouchers. Once NPFC has validated costs on the preview copy of the Billing Summary, CFMC will initiate reimbursement via OPAC. CFMC shall forward to the NPFC and USCG Finance Center the Billing Summary and OPAC accounting information by fax or mail within five working days after submitting the OPAC.

APPENDIX 9. CONTRACTING

A. AUTHORIZATION FOR USE OF UNITED STATES COAST GUARD BASIC ORDERING AGREEMENTS FOR POLLUTION CLEANUP SERVICES AND EQUIPMENT. USEPA may act as an ordering office under the USCG Basic Ordering Agreements (BOAs) issued by Commander (fcp), Maintenance and Logistics Command Atlantic and Commander (fcp), Maintenance and Logistics Command Pacific. This ordering authority is subject to the following conditions:

1. Only Contracting Officers or On-Scene-Coordinators duly warranted by the USEPA in accordance with the Federal Acquisition Regulations (FAR) may issue delivery orders, up to the maximum authority of their warrant, under the BOAs. This authority may not be redelegated. Within 30 days of the execution of this MOU, USEPA will provide a list of the names and addresses of all contracting officers executing delivery orders under the BOAs. The list will include the geographic area of responsibility for each contracting officer. Annually, USEPA will update the list. The initial list and the updates will be provided to the two USCG offices listed in paragraph 13 of this appendix.
2. If a USEPA OSC does not have a Contracting Officer's Warrant, all requirements for BOA services and supplies must be referred to a warranted USEPA Contracting Officer.
3. USEPA Contracting Officers and warranted OSCs shall be responsible for reviewing, understanding and complying with the provisions of the BOAs.
4. All delivery orders shall be within the scope of the BOA and documented as required by the FAR, supplemental agency regulations and the BOA.
5. Delivery orders shall be issued only when emergency cleanup is required and internal USEPA procedures and regulations authorize contracting under the authority of FAR 6.302-2, Unusual and Compelling Urgency; when required, the USEPA shall prepare a Justification for Other than Full and Open Competition (JOTFOC); and under no circumstances shall the BOAs be used for remediation, routine or planned actions.
6. All delivery orders issued by the USEPA shall contain the following information: full address of the contract administration office and name and telephone number of the USEPA Contracting Officer; the full address of the USEPA payment office; the full address where invoices are to be sent; and the name of the entity responsible for certifying receipt and acceptance of services and supplies.
7. The USEPA shall be responsible to certify the receipt and acceptance of the services and supplies in accordance with all laws and regulations, and the terms and conditions of the BOA.

- 1 8. Funding for delivery orders shall comply with applicable provisions elsewhere in
2 this MOU.
3
- 4 9. All payments shall be made by the USEPA authorized payment office cited on
5 each individual delivery order and shall be made in accordance with the Prompt
6 Payment Act and FAR 52.232-25, Prompt Payment.
7
- 8 10. Any interest payable shall be funded by the OSLTF and paid by the USEPA.
9 USEPA shall report to the NPFC total interest paid in the prior fiscal year no later
10 than 15 November of each year.
- 11 11. The USEPA shall not take any action, either directly or indirectly, that could
12 result in a change to the pricing, quality, established response timeframes, or any
13 other terms and conditions of the BOA; or direct the accomplishment of effort
14 which would exceed the scope of the BOA.
15
- 16 12. The USEPA shall resolve all disputes arising from or relating to delivery orders
17 that they issue. All disputes settled in favor of the contractor will be funded out
18 of the OSLTF and in no event will they be paid out of Coast Guard operating
19 funds.
20
- 21 13. Within forty-eight (48) working hours after issuance of a delivery order the
22 USEPA shall forward a copy (minus enclosures) to the NPFC and the appropriate
23 address below:
24
- 25 Commander (fcp), Maintenance and Logistics Command Pacific
26 Building 54A, Coast Guard Island
27 Alameda, CA 94501-5100
28 Commander (fcp-2), Maintenance and Logistics Command Atlantic
29 300 East Main Street, Suite 965
30 Norfolk, VA 23510-9113
31
- 32 14. The USEPA shall provide the appropriate contracting office listed above with a
33 list of closed out delivery orders by May 15 and November 15 each year.
34

35 -End-
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42



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

**OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE**

James C. Card
Rear Admiral, U.S. Coast Guard
Chief, Office of Marine Safety,
Security and Environmental Protection

Dear Admiral Card:

I am pleased to send you two copies of the U.S. Coast Guard (USCG) and U.S. Environmental Protection Agency (USEPA) Superfund Memorandum of Understanding (MOU), and request that you sign it. The MOU establishes funding coordination mechanisms for USCG access to Superfund, and it supersedes the MOU of January 4, 1982.

This MOU is the result of the joint USCG and USEPA MOU workgroup effort begun on June 9, 1993. The workgroup represented all concerned offices in both agencies. The resultant MOU will improve procedures for USCG access to the Superfund and will better serve both agencies' interests.

If you have any questions concerning the MOU please contact:

Jack Crawford
National Pollution Funds Center
USCG
703-235-4742

Mark Mjoness
Emergency Response Division
USEPA
703-603-8727

Please have your staff contact Mr. Mjoness after the MOU is signed and we will make arrangements for obtaining our copy.

I am pleased that the staff of our agencies were able to cooperate on the MOU.

Sincerely,

Elliott P. Laws
Assistant Administrator



U.S. Department
of Transportation
**United States
Coast Guard**



Aug 17 1994

Elliott P. Laws
Assistant Administrator
Office of Solid Waste and
Emergency Response
U.S. Environmental Protection Agency

James C. Card
Rear Admiral, U.S. Coast Guard
Chief, Office of Marine Safety,
Security and Environmental Protection

Harvey G. Pippen, Jr.
Director
Office of Grants and Debarment
U.S. Environmental Protection Agency

Daniel F. Sheehan
Director
National Pollution Funds Center
U.S. Coast Guard

Gentlemen:

We, the members of the joint U.S. Coast Guard (USCG) and U.S. Environmental Protection Agency (USEPA) Superfund Memorandum of Understanding (MOU) Workgroup, request that you sign the enclosed MOU between our agencies. The workgroup represents all concerned offices in both agencies. The MOU establishes funding coordination mechanisms for USCG access to Superfund, and it supersedes the MOU of January 4, 1982.

The MOU is the result of the workgroup effort begun on June 9, 1993. The resultant MOU will improve procedures for USCG access to the Superfund and will better serve both agencies' interests.

If you have any questions concerning the MOU please contact:

Mark Mjones
Emergency Response Division
USEPA
703-603-8727

Jack Crawford
National Pollution Funds Center
USCG
703-235-4742

We are pleased to have been part of the joint effort.

Sincerely,

**U.S. ENVIRONMENTAL PROTECTION
AGENCY**

U.S. COAST GUARD

Mark Mjoness
Emergency Response Division

Darrell Neily
National Pollution Funds Center

Joseph Rauscher
Emergency Response Division

Jack Crawford
National Pollution Funds Center

Esther Williford
Emergency Response Division

CDR Kenneth Keane
Marine Environmental Protection Division

Susan Dax
Financial Management Division

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Kristen Skogebo
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John Andrzejewski
National Pollution Funds Center

Nelson Price
Financial Management Division

CDR Robert Douville
National Pollution Funds Center

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1 **MEMORANDUM OF UNDERSTANDING**
2 **Between**
3 **THE UNITED STATES COAST GUARD**
4 **and**
5 **THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

6 _____

7 **Procedures for United States Coast Guard Access to**
8 **Superfund, to Support Coast Guard Implementation of CERCLA**

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I. PURPOSE

This Memorandum of Understanding (MOU) establishes funding and coordination mechanisms between the United States Coast Guard (USCG) and the United States Environmental Protection Agency (USEPA). USEPA is the fiduciary for Superfund as established under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended. This MOU supersedes the MOU of January 4, 1982, between the USCG and USEPA, and its subsequent amendments.

II. AUTHORITY

Section 104 of CERCLA (42 USC 9604) authorizes the President to act “... whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare...” Executive Order 12580 delegates certain authority and responsibility for response to the Administrator of the USEPA and the Secretary of the Department of Transportation (DOT). On October 9, 1981, and May 27, 1988, the USCG redelegated authority back to the USEPA for certain response actions at hazardous waste sites that require response action (see Attachment A). The USCG and the USEPA enter into this agreement to carry out their responsibilities under CERCLA.

A. DEFINITIONS:

1. “Remove or removal” as defined by section 101(23) of CERCLA, means the cleanup or removal of released hazardous substances from the environment; such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances; the disposal of removed material; or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of CERCLA, and any emergency assistance which may be provided under the Disaster Relief Act of 1974. The term also includes enforcement activities related thereto.

2. “Incident” means the same as the term “site” for accounting and cost recovery purposes.

III. CERCLA COSTS

The Hazardous Substance Superfund (Superfund) is the source of funds for CERCLA removal costs incurred by the USCG. These costs are identified in three major categories:

USCG removal actions, USCG support of USEPA removal actions, and USCG ongoing responsibilities. Such costs are reimbursed by the USEPA via interagency agreements (IAGs) between the USEPA and USCG. These IAGs are prepared in accordance with the procedures in Appendices (A) and (B), and the USEPA's Interagency Agreement Policy and Procedures Compendium of September 1988.

A. REMOVAL COSTS:

USCG Federal On-Scene Coordinators (OSCs) conduct CERCLA removals. All incident-specific removal costs incurred by the USCG qualify as allowable costs under Superfund. These costs are extramural and intramural in nature.

1. Extramural Costs

Extramural costs are those costs incurred external to the USCG: contractor/vendor, other government, etc. Examples of extramural costs include, but are not limited to, the following:

- a. Contractor and consulting costs including lease or rental of equipment supplied by the removal contractor and subcontractor(s);
- b. Supplies, materials and equipment (including transportation costs) procured, leased or rented for the specific removal activity; and
- c. Reimbursement of allowable costs incurred by other Federal agencies (e.g., NOAA), or State or local governments.

2. Intramural Costs

Intramural costs include internal costs incurred by the USCG directly in support of removal activities.

Intramural costs include:

- a. Travel and per diem for USCG military and civilian personnel;
- b. USCG military and civilian personnel costs including civilian overtime costs;
- c. Supplies used in support of a removal activity;
- d. Charges for use of USCG owned equipment and resources;
- e. Replacement or repair of USCG equipment destroyed or damaged as a result of a removal; and
- f. Other miscellaneous expenses.

1
2 **B. USCG COSTS IN SUPPORT OF USEPA REMOVAL ACTIONS:**
3

4 USCG costs in support of USEPA removal actions are incident-specific costs incurred
5 by USCG units in providing direct support to a USEPA OSC conducting a CERCLA
6 removal action. Funding for these costs is through IAGs between each USEPA
7 regional office and the USCG. In such cases, the USEPA OSC will be responsible for
8 certifying USCG costs.
9

10 **C. ONGOING RESPONSIBILITIES COSTS:**
11

12 Pursuant to responsibilities under CERCLA, the USCG conducts removals and
13 monitors removals by responsible parties. Ongoing responsibilities costs are generally
14 non-incident-specific costs for support of the following ongoing activities required to
15 create and maintain the capability to conduct and monitor removals:
16

- 17 • Emergency Removal Training and Equipment
- 18 • Enforcement
- 19 • National Response Center Support
- 20 • Medical Monitoring
- 21 • Information Systems
- 22 • Program Management
- 23 • Response Readiness - National Response Team (NRT) and Regional Response
24 Team (RRT) Support
25

26 Funding for these costs is transferred annually to the USCG in an “Ongoing
27 Responsibilities” IAG. The costs may be extramural or intramural. The annual IAG is
28 prepared in accordance with the procedures in Appendix B.
29

30 **IV. ACCOUNTING FOR ONGOING RESPONSIBILITIES COSTS**
31

32 Superfund accounting and recordkeeping requirements apply to costs funded under the
33 annual ongoing responsibilities IAG. All expenditures under the IAG are recoverable from
34 responsible parties through the application of the USEPA indirect cost model and must be
35 documented. Personnel levels are addressed in the approved personnel model entitled
36 “Alternative Documentation for USCG Salaries Reimbursed by Superfund.” The model
37 justifies the number of reimbursable Full Time Equivalents (FTEs) under the ongoing
38 responsibilities IAG. It analyzes workload and calculates FTE, but does not provide a
39 funding amount for personnel cost reimbursement. If the number of Superfund reimbursed
40 FTEs is greater than the number justified by the model, the USEPA will be reimbursed the
41 difference using average standard personnel costs.
42

43 This model is used during the annual DOT Superfund audit process to show how the USCG
44 Superfund activities translate into USCG billets reimbursed by Superfund. The model was
45 jointly developed and approved by the USEPA and USCG, and it can be revised upon the
46 concurrence of both agencies.

V. INCIDENT CASE FILE

The lead agency OSC (USCG or USEPA) shall maintain a case file for each incident. The case file includes the administrative record as defined in the National Contingency Plan (NCP) and contains information for determining liability and pursuing cost recovery. For each USCG CERCLA removal or support action for a USEPA CERCLA removal, the case file will contain documentation of all resources used and financial transactions associated with the incident, per Appendix A, and the following:

A. FINDING OF IMMINENT AND SUBSTANTIAL ENDANGERMENT:

For incidents with total estimated project costs less than \$250,000, the USCG will document the finding of imminent and substantial endangerment (endangerment determination) in the case file. This documentation will provide sufficient information describing the need for the CERCLA removal action including the threat or potential threat posed by the situation, hazardous substances present (if known) and the selected removal action. Attachment B is provided as a sample format for documenting this finding. The USCG OSC may elect to use either this endangerment determination format or to document the endangerment determination through another format (e.g., within a pollution report - POLREP). The endangerment determination should be made and documented before removal actions take place, circumstances permitting, or as early as possible after emergency removal actions begin.

B. ACTION MEMORANDUM:

For incidents with total estimated project costs equal to or greater than \$250,000, the USCG will submit an approved action memorandum, which includes an endangerment determination, to the Director, Emergency Response Division (ERD), USEPA prior to obligating funds in excess of \$250,000 (see “Superfund Removal Procedures, Action Memorandum Guidance,” USEPA Publication Number: EPA/540/P-90/004, OSWER Directive 9360.3-01, December 1990).

For incidents with total estimated project costs equal to or greater than \$250,000 and requiring an amendment to increase the funding authorized in the IAG, the USCG will submit a draft action memorandum to the Director, ERD, USEPA for review and timely comment, and coordination with the IAG amendment. When a USCG OSC needs to act immediately, ERD, USEPA may extend an oral commitment of funding. Oral commitments will be confirmed in writing.

In all cases, the action memorandum must describe the threat and the rationale for choosing a particular remedy - including the technical basis for the decision.

VI. QUALITY ASSURANCE

The USCG will comply with its internal Quality Assurance (QA)/chain of custody policies and procedures, published in USCG Commandant Instructions, in responding to releases

1 of hazardous substances, pollutants and contaminants. Commandant Instructions
2 M16465.29 and M16465.30 specifically address responses under CERCLA. The Marine
3 Safety Manual, Commandant Instruction M16000 series, includes policy for pollution
4 removal activities. These instructions address the conduct of operations, personnel
5 protection associated with operations, decision making, and identification and disposal of
6 recovered pollutants, and documentation.

7
8 The USCG utilizes commercial laboratories to identify substances in pollution incidents.
9 To assure that the information from these laboratories is reliable, the USCG will utilize all
10 available information, including USEPA performance data, to evaluate candidate
11 laboratories.

12
13 For non-time-critical removals, the USCG will assure that the quality of physical, chemical,
14 and biological data developed in the assessment and operational phases of a removal is
15 addressed per the NCP and will be addressed as needed in removal contracts.

16
17 USEPA agrees to provide clause(s), or other language suitable for use in contractual
18 statements of work, as requested, to assist the USCG in the preparation of these contracts.
19
20

21 **VII. MODIFICATION AND TERMINATION**

22
23 Either the USCG or the USEPA may propose changes to this MOU. Both agencies must
24 approve a change before it becomes effective. Either party may terminate the MOU by
25 giving a thirty (30) day written notice. Adding or changing appendices or attachments to
26 this MOU does not constitute modification of the overall MOU.

27 Such additions or changes may be made by agreement of officials responsible for the
28 specific subject area in the USEPA and USCG. The officials making any such change will
29 immediately bring the change to the attention of the signers of this MOU, or their
30 successors, and then publish the change so as to inform all users of the MOU.
31

32 **VIII. PERIOD OF AGREEMENT**

33
34 This MOU shall continue in effect until terminated, or modified or amended. This MOU
35 shall become effective on the date of the last signature below.
36
37
38

IX. SIGNATURES

Elliott P. Laws
Assistant Administrator
Office of Solid Waste and Emergency
Response
U.S. Environmental Protection Agency

DATE: _____

James C. Card
Rear Admiral, U.S. Coast Guard
Chief, Office of Marine Safety, Security
and Environmental Protection

DATE: _____

Harvey G. Pippen Jr.
Director
Office of Grants and Debarment
U.S. Environmental Protection Agency

DATE: _____

Daniel F. Sheehan
Director
National Pollution Funds Center

DATE: _____

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APPENDIX A

PROCEDURES FOR MULTI-INCIDENT REMOVAL INTERAGENCY AGREEMENTS (IAGS)

The following procedures apply to IAGs funding CERCLA removals conducted by USCG OSCs:

1. ORIGINATION PHASE

Incidents can occur any day of the year, and the USCG must have funding to respond on the first day of the fiscal year. The following procedures are structured with the objective of providing funding without fiscal year transition interruption. If experience indicates a need for change, the procedures should be modified to meet the objective. In the absence of a current fiscal year budget, the USCG may incur incident-specific removal costs, pursuant to CERCLA, Executive Order 12580, and the NCP. In such cases, the USEPA will certify those costs as necessary and appropriate to the IAG project and in the government's best interests.

- A. The ERD, USEPA HQ, in cooperation with the National Pollution Funds Center (NPFC), USCG HQ, will develop the next fiscal year's cost estimate, budget, scope of work and special condition information for the IAG by August 31 of each fiscal year.
- B. The ERD will prepare the IAG funding package [three (3) original IAGS, a decision Memorandum and a commitment notice] and forward it to the Assistant Administrator, Office of Solid Waste and Emergency Response (AA, OSWER) or designee for review and signature.
- C. When approved, the IAG funding package will be forwarded to the Grants Administration Division (GAD), USEPA for legal and administrative review and USEPA Action Official signature.
- D. Following USEPA Action Official signature, GAD transmits two complete IAGs to the NPFC, USCG. GAD keeps the third as back-up.
- E. The NPFC, USCG official shall review the IAG and, if acceptable, sign the two originals, retain one signed original and return the other to GAD.
- F. GAD shall retain the signed original and transmit one copy to the Cincinnati Financial Management Center (CFMC), USEPA for obligation and one copy to the ERD, USEPA.

1 2. EXECUTION PHASE

3 A. NOTIFICATION:

4 Within 24 hours following initiation of a CERCLA removal, the NPFC, USCG will
5 provide to the ERD, USEPA information (endangerment determination, POLREP
6 or action memorandum) on the incident and a cost estimate. In return, ERD will
7 provide to NPFC a USEPA Site/Spill Identification (SSID) number to link the
8 USCG and USEPA records, tracking and financial systems.

9
10 B. INCIDENT CASE FILE:

11 The lead agency OSC (USCG or USEPA) will maintain each incident's case file.
12 For each USCG CERCIA removal or support action for an USEPA CERCLA
13 removal, the case file contains documentation of all resources used and financial
14 transactions associated with the incident.

15
16 C. POLLUTION REPORTS:

17 The USCG shall provide copies of pollution reports (POLREPS) to the Director,
18 ERD, USEPA to provide CERCLA removal and fund obligation data. The initial
19 POLREP shall be provided within 72 hours of initiating CERCLA removal.
20 Progress POLREPs should be provided on a routine basis.

21
22 No later than 2 weeks after completion of each incident removal, the USCG shall
23 forward a final POLREP to the ERD for inclusion in the USEPA's incident case
24 file.

25
26 D. EQUIPMENT:

- 27 1. Purchase of equipment to support a removal will be recorded in the IAG and
28 the cost documentation records in the case file.
- 29
30 2. Replacement of items in the National Strike Force (NSF) inventory will be
31 subject to the NSF CERCLA inventory controls.
- 32
33 3. Replacement of USCG equipment or assets is an agency reimbursement, not
34 an equipment purchase for purposes of CERCLA recordkeeping.
- 35
36 4. All equipment purchase records and the equipment will be available for
37 audit.

38
39 E. BILLING:

40 The USCG will submit a bill to:

41
42 USEPA Cincinnati Financial Management Center
43 ATTN: Financial Management Officer
44 26 West Martin Luther King Drive
45 Cincinnati, OH 45268
46

Each bill shall cite: 1) the number of the IAG providing the funding and 2) an incident-specific breakdown of charges. Within 30 days of the billing, NPFC will provide the ERD Project Officer and CFMC additional accounting system reports detailing the costs on the bill by individual incidents using USEPA assigned SSID numbers. CFMC will forward the bill to the USEPA Project Officer for review and approval. Inadequately supported bills will not be paid, or in the case of OPACs will be charged back.

F. USEPA REVIEW:

The USEPA Project Officer will review the billing documents and the other supporting accounting system reports for reasonableness and will approve the payment or, if questions arise, contact NPFC for clarification.

G. PRIOR NOTIFICATION OF COSTS:

The USCG will notify the USEPA Project officer before it incurs costs in excess of 80% of total budget amount for any IAG or in anticipation of undertaking a high cost removal action. In such cases, upon the approval of the USEPA Project Officer, the USCG and the USEPA will develop an amendment to the IAG for increased funding.

H. REPORTING REQUIREMENTS:

1. The USCG will submit quarterly progress reports to the USEPA Project Officer showing obligations in each budget category, balance remaining, summary of activities and property inventory. Reports will be cumulative and the fourth quarterly report of the year will be the final report for the year.
2. The USCG will maintain a list of funded incidents showing open/closed status (i.e., whether further obligations will occur) and will send it to the USEPA Project Officer with the quarterly progress reports.
3. A detailed cost report for each incident will be provided to the USEPA Project Officer with each quarterly report. Each incident-specific cost report will detail costs by the elements which constitute the budget categories appearing on Item 22, EPA IAG Form (1610-1) and all items of equipment purchased outside standard inventory costing over \$1,000.

I. ADMIRALTY LAW CASES:

When a USCG OSC leads a CERCLA response involving certain time-sensitive litigation such as an injunction, a vessel arrest or an action by a vessel owner to limit liability, the USCG may be asked to provide the best available information directly to the Department of Justice (DOJ), and it may be appropriate to do so. DOJ often must respond within strict time limits set by the court, which may be before the cost documentation records normally are ready to be forwarded to the USEPA. The USCG agrees to cooperate in such matters, and also will immediately notify the USEPA.

1 3. CLOSE-OUT PHASE

2
3 A. NOTIFICATION OF COMPLETION:

4 When the USCG has completed removal work on all incidents funded under the
5 IAG for a fiscal year, NPFC will submit, within 60 days, the fourth quarter progress
6 report. That report will serve as a final report to the USEPA Project Officer and
7 include:

- 8
9 1. A list of incidents funded, showing the USEPA SSID number and total cost for
10 each incident.
11
12 2. A summary of expenditures by budget category showing the balance of funds
13 remaining.
14
15 3. A property inventory for non-expendable items costing over \$1,000 each.

16
17 B. OSC REPORTS:

18 When an OSC report is prepared pursuant to the NCP, 40 CFR 300.165
19 (OSC reports), the USCG will submit a copy of the OSC report to the USEPA
20 Project Officer for inclusion in the incident case file.

21
22 C. CLOSE-OUT:

23 Upon receipt of the final report the USEPA Project Officer will initiate close-out
24 procedures.

25
26 D. PROPERTY DISPOSITION:

27 The USCG will consult the USEPA prior to disposition of property acquired under
28 the IAG to assure that the disposition method properly reflects the interests of
29 Superfund.

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APPENDIX B

**PROCEDURES FOR “ONGOING RESPONSIBILITIES
INTERAGENCY AGREEMENTS (IAGs)”**

The following procedures are for IAGs to reimburse costs incurred by the USCG for support, training and maintenance of its removal capabilities:

1. **ORIGINATION PHASE**

- A. The ERD, USEPA HQ, in cooperation with the NPFC, USCG HQ, develops the next fiscal year cost estimate, budget, scope of work and special condition information for the IAG by August 31 of each fiscal year.
- B. The ERD shall prepare the IAG funding package [three (3) original IAGs, a decision memorandum and a commitment notice] and forward it to the AA, OSWER or designee for review and signature.
- C. When approved, the IAG funding package will be forwarded to the GAD, USEPA for legal and administrative review and USEPA Action Official signature.
- D. Following USEPA Action Official signature, GAD transmits two IAG forms to the NPFC, USCG. GAD keeps the third copy as back-up.
- E. The NPFC, USCG official shall review and, if acceptable, sign the two original IAGs, retain one signed original and return the other to GAD, USEPA.
- F. GAD shall retain the signed original and transmit one copy to the CFMC, USEPA for obligation and one copy to the ERD.

2. **EXECUTION PHASE**

A. **BILLING:**

To receive reimbursement for costs incurred under the IAG, the USCG shall submit a bill to:

USEPA Cincinnati Financial Management Center
ATTN: Financial Management Officer
26 West Martin Luther King Drive
Cincinnati, OH 45268

CFMC will forward the bill to the USEPA Project Officer for review and approval. Inadequately supported bills will not be paid, or in the case of OPACs will be charged back.

Each bill shall contain the IAG number.

1 The USEPA Project Officer will review the bill for reasonableness and will
2 approve the payment or, if questions arise, contact NPFC for clarification.
3

4 **B. REPORTING REQUIREMENTS:**
5

6 The USCG will provide the USEPA Project Officer with the ongoing
7 responsibilities project workplan by December 31 of each year. The workplan will
8 include:
9

- 10 • distribution of reimbursed FTEs by organizational location (specific field
11 office or division in Headquarters);
12
- 13 • identification of organizational elements with CERCLA responsibilities and
14 eligibility for funding under this agreement. Categorize each organization's
15 function under one or more of the following:
16
 - 17 • Emergency Removal Training and Equipment
 - 18 • Enforcement
 - 19 • National Response Center Support
 - 20 • Medical Monitoring
 - 21 • Information Systems
 - 22 • Program Management
 - 23 • Response Readiness - NRT and RRT Support
- 24
- 25 1. The USCG will submit quarterly progress reports to the USEPA Project
26 Officer showing obligations in each budget category, balance remaining,
27 summary of activities and property inventory. Reports will be cumulative
28 and the fourth quarterly report of the year will be the final report for the
29 year.
30
- 31 2. The USEPA Project Officer will file the workplan and the quarterly progress
32 reports in the ERD IAG file.
33

34 **3. CLOSE-OUT PHASE:**
35

36 A. When the USCG has completed work on all activities funded under that IAG,
37 NPFC will submit, within 60 days, the fourth quarter progress report. That will
38 serve as a final report to the USEPA Project Officer and include:
39

- 40 1. Summary of activities;
- 41
- 42 2. Property inventory for non-expendable items costing over \$1000 each;
43
- 44 3. Summary of expenditures by budget category and balance of funds
45 remaining.
46

- 1 B. Upon receipt of the final report, the USEPA Project Officer will initiate close-out
- 2 procedures.
- 3
- 4 C. The USCG will consult the USEPA prior to disposition of property acquired under
- 5 this agreement to assure that the disposition method properly reflects the interests
- 6 of Superfund.

APPENDIX C

RECORDKEEPING

Under CERCLA, the Federal government is authorized to recover removal costs from responsible parties, including investigatory, cleanup, enforcement and administrative costs. The USEPA intends to recover all such costs. The USCG has established the NPFC which, among other functions, administers USCG use of CERCLA funds.

The USCG will follow the Superfund financial management and recordkeeping guidelines contained in the USEPA's "Superfund Financial Management and Recordkeeping Guidance for Federal Agencies" (January 1989), unless specifically addressed in this MOU or an IAG. Consistent with this, the USCG will create a case file for each incident funded under a multi-incident IAG. The case file will contain a complete set of cost records. The USCG also will create files for cost records for transactions under the ongoing responsibilities IAGs.

1. COST RECOVERY DOCUMENTATION

The USCG records for Superfund activities will meet the following criteria needed for cost recovery:

A. CONSISTENT FILING PROTOCOL:

The USCG will maintain consistent records showing uses of Superfund. The USCG will use its own filing protocols.

B. TIMELY RESPONSE TO COST RECOVERY DOCUMENTATION REQUESTS:

The USCG will provide these records to the USEPA upon request within 30 days, unless otherwise agreed.

C. RECORDS RETAINED:

The USCG will retain the following cost documentation:

1. Direct Costs

Standard Personnel Costs (Including Fringe Benefits)

Travel

Extramural (e.g., contractor)

Materials and Supplies

Equipment

Construction

2. Indirect Costs

3. Interagency Agreement Documents

1 D. RECONCILIATION:

2 Periodically the USCG will reconcile cost documentation with data produced by its
3 accounting system.

4
5 E. PERSONNEL COST REIMBURSEMENT MODEL:

6 The USCG does not employ a universal timecard system that reflects CERCLA
7 activities. To provide detailed and accurate records of personnel costs reimbursed
8 under the ongoing responsibilities IAG, the USCG will periodically generate data
9 using the “Alternative Documentation for USCG Salaries Reimbursed by
10 Superfund” model. If the model justifies fewer than the number of existing
11 CERCLA billets, the USCG will reimburse Superfund for the unsupported number
12 of billets, using the average personnel cost of all the reimbursed billets. The USCG
13 will report the models’ computation results in the fourth quarterly progress report.
14 If the model documents more FTEs than the number of existing CERCLA
15 reimbursed billets, reimbursement will not exceed the total amount agreed in the
16 current annual ongoing responsibilities IAG. Increased funding to support
17 additional FTEs in subsequent fiscal years may occur in the annual budget process.
18

19 F. STORAGE MEDIA & RECORD SAFETY:

20 USCG records will be located in the offices where they are used or other areas as
21 secure as possible from fire, water and other damage. Similar provision will be
22 made for safe long-term storage of inactive documentation.
23

24 G. IMAGED DOCUMENTS:

25 Use of imaged documents for cost documentation, billing, and all audit resolution is
26 acceptable under the following conditions:
27

- 28 1. The imaging system is used in the normal course of business.
- 29 2. The USCG can certify the accuracy of the system.
- 30
- 31

32 H. RECORD RETENTION:

33 The USCG or its contractors will retain all cost documentation on-site or at a
34 Federal Records Center for a minimum of ten years after submission of a final IAG
35 payment request. If legal action regarding an incident is initiated within the ten
36 year period, records will be retained until the conclusion of legal action. In
37 addition, the USCG will obtain written permission from the USEPA IAG Action
38 Official prior to disposing of any Superfund cost records. Lack of response from
39 the USEPA IAG Action Official within 30 days will constitute approval.
40
41

42 I. AUDITS:

43 CERCLA requires the Inspector General of each Agency using Superfund to conduct an
44 annual audit of all transactions by that Agency involving the Superfund. USCG cost
45 documentation will be available for audit or verification upon request of the DOT
46 Inspector General. If, based on an audit by the DOT Inspector General, the USCG

1 determines that any direct or indirect costs charged to Superfund are unallowable, the
2 USCG will immediately notify the USEPA and promptly reimburse Superfund.
3

4 2. IAG RECORDS
5

6 The USCG financial and program management offices will maintain records for the
7 multi-incident and ongoing responsibilities IAGs. Those records will include, when
8 applicable:
9

10 A. FINANCIAL RECORDS:

- 11 • IAG forms executed by both agencies.
- 12
- 13 • Invoices and payment records.
- 14
- 15 • Closeout documentation, if different from above.
- 16

17 B. PROGRAM RECORDS:

- 18 • Record of discussions and contacts and the resulting decisions.
- 19
- 20 • IAG forms executed by both agencies.
- 21
- 22 • Endangerment Determinations
- 23
- 24 • Action Memoranda
- 25
- 26 • POLREPs
- 27
- 28 • Invoices and payment records.
- 29
- 30 • Closeout documentation, if different from above.
- 31
- 32

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ATTACHMENT A

INSTRUMENTS OF REDELEGATION

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THE SECRETARY OF TRANSPORTATION

WASHINGTON, D.C. 20590

OCT 2 1981

The Honorable Anne M. Gorsuch
Administrator
U. S. Environmental Protection Agency
401 "M" Street, S.W.
Washington, D. C. 20460

Dear Mrs. Gorsuch:

Our respective staffs have worked out the attached redelegation instrument for certain functions contained in the "Comprehensive Environmental Response, Compensation and Liability Act of 1980, P.L. 96-510" and Executive Order 12316, "Responses to Environmental Damage". The redelegating instrument is drafted consistent with Section 8 (f) of the Executive Order which authorizes redelegations of functions, with the consent of the head of the agency to which the functions are redelegated.

I am confident that the redelegation agreement properly assigns authority and responsibility consistent with the structure and delegations which you envision for the revised "National Oil and Hazardous Substances Pollution Contingency Plan". I request that you countersign and return the enclosed redelegation instrument, thereby indicating your consent to the redelegation.

Sincerely,

1 Enclosure

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INSTRUMENT OF REDELEGATION

In accordance with Section 8 (f) of Executive Order 12316 of August 14, 1981, the Secretary of the Department in which the Coast Guard is operating hereby redelegates to the Administrator, Environmental Protection Agency, subject to the Administrator's consent, all functions specified in Sections 2 (d), 2 (f), 2 (g), 3 (a), and 4 (b) of that Executive Order with the exception of the following:

- a. Functions related to responses to releases or threats of releases from vessels;
- b. Functions related to immediate removal action concerning releases or threats of releases at facilities other than active or inactive "hazardous waste management facilities" (as defined in 40 CFR 122.3); and
- c. Functions related to immediate removal action concerning releases or threats of releases at active or inactive "hazardous waste management facilities" when the Coast Guard On-Scene Coordinator determines that such action must be taken pending the arrival on scene of an Environmental Protection Agency On-Scene Coordinator. Unless otherwise agreed upon by EPA and Coast Guard, this authority will not be exercised unless the EPA OSC is scheduled to arrive on scene within 48 hours of notification of the release or threat.

For purposes of this instrument: the term "immediate removal action" includes any removal action which, in the view of the Coast Guard On-Scene Coordinator, must be taken immediately to prevent or mitigate immediate and significant harm to human life or health, to the environment, or to real or personal off-site property. Situations in which such action may be taken include, but are not limited to, fire, explosions, and other sudden releases; human, animal, or food chain exposure to acutely toxic substances; and the contamination of a drinking water supply.

All functions described in this instrument, whether redelegated or retained, include the authority to contract for, obligate monies for, and otherwise arrange for and coordinate the responses included within such functions.

Andrew L. Lewis, Jr.
Secretary of Transportation

Date

I hereby consent to the redelegation as set forth in this instrument

Anne M. Gorsuch
Administrator

Date

PRESIDENTIAL DOCUMENTS

EXECUTIVE ORDER 12316 OF AUGUST 14, 1981

RESPONSES TO ENVIRONMENTAL DAMAGE

By the authority vested in me as President of the United States of America by Section 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (94 Stat. 2796; 42 U.S.C. 9615), it is hereby ordered as follows:

Section 1. National Contingency Plan.

- (a) The National Contingency Plan, hereinafter referred to as the NCP and which was originally published pursuant to Section 311 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321) shall be amended to contain the implementing procedures for the coordination of response actions to releases of hazardous substances into the environment.
- (b) The NCP shall contain a concept of a national response team composed of representatives of appropriate Executive agencies for the coordination of response actions. The national response team shall, in addition to representatives of other appropriate agencies, include representatives of the following: Department of State, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Transportation, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, and United States Coast Guard.
- (c) The responsibility for the amendment of the NCP and all of the other functions vested in the President by Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, hereinafter referred to as the Act (42 U.S.C. 9605), is delegated to the Administrator of the Environmental Protection Agency.
- (d) In accord with Section 111(h)(1) of the Act and Section 311(f)(5) of the Federal Water Pollution Control Act, as amended (33 U.S.C., 1321(f)(5)), the following shall be among those designated in the NCP as Federal trustees for natural resources:
 - (1) Secretary of Defense.
 - (2) Secretary of the Interior.
 - (3) Secretary of Agriculture.
 - (4) Secretary of Commerce.

- (e) Amendments to the NCP shall be coordinated with members of the national response team prior to publication for notice and comment. Amendments shall also be coordinated with the Federal Emergency Management Agency and the Nuclear Regulatory Commission in order to avoid inconsistent or duplicative requirements in the emergency planning responsibilities of those agencies.
- (f) All amendments to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget.

Section.2. *Response authorities.*

- (a) The functions vested in the President by the first sentence of Section 104(b) of the Act relating to “illness, disease, or complaints thereof” are delegated to the Secretary of Health and Human Services who shall, in accord with Section 104(i) of the Act, perform those functions through the Public Health Service.
- (b) (1) The functions vested in the President by Section 101(24) of the Act, to the extent they require a determination by the President that “permanent relocation of residents and businesses and community facilities” is included within the terms “remedy” or “remedial action” as defined in Section 101(24) of the Act, are delegated to the Director of the Federal Emergency Management Agency.
- (2) The functions vested in the President by Section 104(a) of the Act, to the extent they require permanent relocation of residents, businesses, and community facilities or temporary evacuation and housing of threatened individuals not otherwise provided for, are delegated to the Director of the Federal Emergency Management Agency.
- (c) The functions vested in the President by Section 104 (a) and (b) of the Act are delegated to the Secretary of Defense with respect to releases from Department of Defense facilities or vessels, including vessels owned or bare-boat chartered and operated.
- (d) Subject to subsections (a), (b), and (c) of this Section, the functions vested in the President by Sections 101(24) and 104 (a) and (b) of the Act are delegated to the Secretary of the Department in which the Coast Guard is operating, hereinafter referred to as the Coast Guard, with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.
- (e) Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 10(24) and 104 (a) and (b) of the Act are delegated to the Administrator of the Environmental Protection Agency, hereinafter referred to as the Administrator.
- (f) The functions vested in the President by Section 104 (c), (d), (f), (g), and (h) of the Act are delegated to the Coast Guard, the Secretary of Health and Human Services, the Director of the Federal Emergency Management Agency, and the Administrator in order to carry out the functions delegated to them by subsections (a), (b), (d), and (e) of this Section. The exercise of authority under Section 104(h)

of the Act shall be subject to the approval of the Administrator of the Office of Federal Procurement Policy.

- (g) The functions vested in the President by Section 104(e)(2)(C) of the Act are delegated to the Administrator, all other functions vested in the President by Section 104(e) of the Act are delegated to the Secretary of Defense, the Secretary of Health and Human Services, the Coast Guard, the Director of the Federal Emergency Management Agency, and the Administrator of the Environmental Protection Agency, in order to carry out the functions delegated to them by this Section.

Section 3. *Abatement Action.*

- (a) The functions vested in the President by Section 206(a) of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes water, ports, and harbors.
- (b) Subject to subsection (a) of this Section, the functions vested in the President by Section 106(a) of the Act are delegated to the Administrator.

Section 4. *Liability.*

- (a) The function vested in the President by Section 107)(c)(i)(C) of the Act is delegated to the Secretary of Transportation.
- (b) The Functions vested in the President by Section 107(c)() of the Act are delegated to the Coast Guard with respect in any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.
- (c) Subject to subsection (b) of this Section, the functions vested in the President by Section 107(c)(3) of the Act are delegated to the Administrator.
- (d) The functions vested in the President by Section 107(f) of the Act are delegated to each of the Federal trustees for natural resources set forth in Section 1(d) of this Order to resources under their trusteeship.

Section 5. *Financial Responsibility.*

- (a) The functions vested in the President by Section 107(k)(6)(B) of the Act are delegated to the Secretary of the Treasury. The Administrator will provide the Secretary with such technical information and assistance as the Administrator may have available.
- (b) The functions vested in the President by Section 108(a) of the Act are delegated to the Federal Maritime Commission. Notwithstanding Section 1(d) of Executive Order No. 12291, the regulations issued pursuant to this authority shall be issued in accordance with that Order. The Commission shall be responsible, in accord with Section 109 of the Act, for the enforcement of civil penalties for violations of the regulations issued under Section 108(a) of the Act.

- (c) The functions vested in the President by Section 108(b) of the Act are delegated to the Secretary of Transportation with respect of all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.
- (d) Subject to subsection (c) of this Section, the functions vested in the President by Section 108(b) of the Act are delegated to the Administrator.

Section 6. Employee Protection and Notice to Injured.

- (a) The functions vested in the President by Section 110(e) of the Act are delegated to the Secretary of Labor.
- (b) The functions vested in the President by Section 111(g) of the Act are delegated to the Secretary of Defense with respect to releases from Department of Defense facilities or vessels, including vessels owned or bare-boat chartered and operated.
- (c) Subject to subsection (b) of this Section, the functions vested in the President by Section 111(g) of the Act are delegated to the Administrator.

Section 7. Management of the Hazardous Substance Response Trust Fund and Claims.

- (a) The functions vested in the President by Section 111(a) of the Act are delegated to the Administrator, subject to the provisions of this Section and applicable provisions of this Order.
- (b) The Administrator shall transfer, to transfer appropriation accounts for other agencies, from the Hazardous Substance Response Trust Fund, out of sums appropriated, such amounts as the Administrator may determine necessary to carry out the purposes of the Act. These allocations shall be consistent with the President's Budget, within the amounts approved by the Congress, unless a revised allocation is approved by the Director of the Office of Management and Budget.
- (c) The Administrator shall chair a budget task force composed of representatives of agencies having responsibilities under this Order or the Act. The Administrator shall also, as part of the budget request for the Environmental Protection Agency, submit a budget for the Hazardous Substance Response Trust Fund which is based on recommended allocations developed by the budget task force. The Administrator may prescribe reporting and other forms, procedures, and guidelines to be used by the agencies of the Task Force in preparing the budget request.
- (d) The Administrator and each agency head in whom funds are allocated pursuant to this Section, with respect to funds allocated to them, are authorized in accordance with Section 111(f) of the Act to designate Federal officials who may obligate such funds.
- (e) The functions vested in the President by Section 112 of the Act are delegated to the Administrator for all claims presented pursuant to Section III.

Section 8. *General Provisions.*

- (a) Notwithstanding any other provision of this Order, any representation pursuant to or under this Order in any judicial or quasi-judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General.
- (b) Notwithstanding any other provision of this Order, the President's authority under the Act to require the Attorney General to commence litigation is retained by the President.
- (c) The functions vested in the President by Section 301 of the Act are delegated as following:
 - (1) With respect to subsection (a), to the Administrator in consultation with the Secretary of the Treasury.
 - (2) With respect to subsection (b), to the Secretary of the Treasury.
 - (3) With respect to subsection (c), to the Secretary of the Interior.
 - (4) With respect to subsection (f), to the Administrator.
- (d) The Attorney General shall manage and coordinate the study provided for in Section 301(e) of the Act.
- (e) The performance of any function under this Order shall be done in consultation with interested agencies represented on the national response team, as well as with any other interested agency.
- (f) Certain functions vested in the President by the Act which have been delegated or assigned by this Order may be redelegated to the head of any agency with his consent; those functions which may be redelegated are those set forth in Sections 2, 3, 4(b), 4(c), and 6(c) of this Order.
- (g) Executive Order No. 12286 of January 19, 1981, is revoked.

THE WHITE HOUSE

August 14, 1981.

[FR Doc. 81-24411

Filed 8-16-81, 1:23 pm]

Billing code 3125-01-M

INSTRUMENT OF REDELEGATION

1. Except as provided in paragraph 2 below, in accordance with Section 11(g) of Executive Order 12580 of January 23, 1987, the Secretary of the Department in which the Coast Guard is operating hereby delegates to the Administrator, Environmental Protection Agency (EPA), subject to the Administrator's consent.
 - a. all functions specified in Sections 2(f) 4(c), and 5(b) of that Executive Order;
and
 - b. the functions specified in Sections 2(i), 2(j)(2), 2(k), and 6(c) of that Executive Order to the extent that those functions relate to the functions specified in Section 2(f) of that Executive Order.
2. The functions redelegated under this Instrument of Redelegation do not include;
 - a. functions related to responses to releases or threats of releases from vessels;
 - b. functions related to emergency action concerning releases or threats of releases at facilities other than active or inactive "hazardous waste management facilities" (as defined in 40 CFR 270.2); and
 - c. functions related to emergency action concerning releases or threats of releases at active or inactive "hazardous waste management facilities" when the Coast Guard On-Scene Coordinator (OSC) determines that such action must be taken pending the arrival on scene of an EPA OSC. Unless otherwise agreed upon by the EPA and Coast Guard, this authority will not be exercised unless the EPA OSC is scheduled to arrive on scene within 48 hours of notification of the release or threat of release.
3. For purposes of this Instrument, the term "emergency action", includes any removal action which, in the view of the Coast Guard OSC, must be taken immediately to prevent or mitigate immediate and significant danger to the public health, welfare or the environment. Situations in which such actions may be taken include, but are not limited to, fire, explosions, and other sudden releases; human, animal, or food chain exposure to acutely toxic substance, and the contamination of a drinking water supply.

4. All functions described in this document, whether redelegated or retained, include the authority to contract for, obligate monies for, and otherwise arrange for and coordinate the responses included within such functions.

(Acting)

Date

Secretary of Transportation

I hereby consent to the redelegation as set forth in this instrument.

Date

Administrator, Environmental Protection Agency

ATTACHMENT B

ENDANGERMENT DETERMINATION

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**FINDING OF IMMINENT AND SUBSTANTIAL ENDANGERMENT
AT THE
SUPERFUND INCIDENT**

Because of the factors outlined below, I have determined that a threat exists to the public health or welfare or the environment at the _____ Superfund incident. An imminent and substantial endangerment to the public health or welfare or the environment exists because of an actual or threatened release of a hazardous substance at or from the incident.

1. SUPERFUND INCIDENT INFORMATION

Incident Name: _____

Incident Number: _____

Incident Location: _____
(County, and State)

USCG Contractor: _____

Potentially Responsible Party: _____

Access: _____ Restricted _____ Unrestricted

NPL Status: _____

Removal Start Date: _____

2. THREAT TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT

A. Chronological Background _____

(e.g., when incident initially identified and by whom, number of drums, etc.)

B. Hazardous Substances Present _____

(if known, otherwise indicate “suspected hazardous substance”)

C. Nature of Actual or Threatened Release of Hazardous Substance at or from the Incident _____

(e.g., drum of unknown materials washed ashore, leaking drum, unknown material released into a stream resulting in a fish kill, level of security provided to minimize threat, etc.)

Check applicable factors (from Section 300.415 of the National Contingency Plan NCP) which were considered in determining the appropriateness of a removal action:

_____ 300.415(b) (2) (i) Actual or potential exposure sure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants.

_____ 300.415(b) (2) (ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems.

_____ 300.415(b) (2) (iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that pose a threat of release.

_____ 300.415(b) (2) (iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate.

_____ 300.415(b) (2) (v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released.

_____ 300.415(b) (2) (vi) Threat of fire or explosion.

_____ 300.415(b) (2) (vii) The availability of other appropriate Federal or State response mechanisms to respond to the release.

_____ Other situations or factors that may pose threats to public health or welfare or the environment.

3. **SELECTED REMOVAL ACTION** (briefly describe removal; e.g., disposal of drums, neutralization of corrosive, conduct of analysis to determine hazardous substances present, security provided to eliminate threat, etc.)

This finding of imminent and substantial endangerment has been entered in the incident's administrative record.

(Signature)

(typed name)

(title)

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MEMORANDUM OF UNDERSTANDING

between

**THE NATIONAL OCEAN SERVICE/NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION**

and

THE NATIONAL POLLUTION FUNDS CENTER/UNITED STATES COAST GUARD

**For Funding and Reimbursement in Support of
United States Coast Guard On-Scene Coordinator
for Oil and/or Hazardous Substance Removal**

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1 **I. PURPOSE**

2
3 Under Section 311 of the Clean Water Act, and Section 104 of the Comprehensive
4 Environmental Response, Compensation and Liability Act of 1980 (CERCLA), the
5 United States Coast Guard (USCG) is responsible for ensuring removal of discharges or
6 releases of 1) oil and/or 2) hazardous substances in the coastal zone as defined by the
7 National Oil and Hazardous Substances Pollution Contingency Plan (NCP). Upon request
8 by the Federal On-Scene Coordinator (FOSC), the National Oceanic and Atmospheric
9 Administration (NOAA) Scientific Support Coordinator (SSC), provides support services
10 to the FOSC related to scientific issues affecting the removal. NOAA may also provide
11 other services to the FOSC during a removal as a member of the Regional Response
12 Team. This Memorandum of Understanding (MOU) identifies the cost reimbursement
13 protocols for those services. This agreement does not address protocols, services, or
14 incident costs associated with the Natural Resource Damage Assessment activities.

1 **II. DEFINITIONS**

3 **A. Federal On-Scene Coordinator (FOSC)**

4 The FOSC is the Federal official pre-designated by the USCG to coordinate and direct
5 responses under subpart D or E of the NCP (40 CFR §300.5).

7 **B. Scientific Support Coordinator (SSC)**

8 When designated by the FOSC, the NOAA SSC is the principal advisor for
9 scientific issues, communication with the scientific community, and coordination of
10 requests for assistance from state and Federal agencies regarding scientific studies.

11 The SSC may serve on the FOSC's staff supporting the Unified Command or within
12 the Planning or Operational Component of the Incident Command System and may, at
13 the FOSC's request lead a scientific team to provide scientific support for operational
14 decisions.

16 **C. Regional Response Team (RRT)**

17 The National Response System (NRS) is the mechanism for coordinating response
18 actions by all levels of government in support of the FOSC. The NRS organization is
19 divided into national, regional, and area levels. National planning and coordination is
20 accomplished through the National Response Team (NRT). The NRT consists of
21 representatives from 16 Federal agencies. Regional planning and coordination of
22 preparedness and response actions is the responsibility of the RRT. The RRT agency
23 membership parallels that of the NRT, but also includes state, and sometimes, local
24 representation. RRT members provide FOSCs with assistance from their respective
25 Federal agencies commensurate with agency responsibilities, resources, and
26 capabilities within that region.

1 D. Remove or Removal

2 “Remove” or “removal” is defined in 33 USC 1321 (a) to mean “containment and
3 removal of the oil or hazardous substances from the water and shorelines or the taking
4 of such other actions as may be necessary to minimize or mitigate damage to the
5 public health or welfare, including, but not limited to, fish, shellfish, wildlife, and
6 public and private property, shorelines, and beaches.”

7
8 E. Removal Costs

9 “Removal costs” is defined in 33 USC 2701 (31) as “the costs of removal that are
10 incurred after a discharge of oil has occurred or, in any case in which there is a
11 substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil
12 pollution from such an incident.” Note that the terms “response” and “remediation” are
13 not used in OPA.

14
15 F. NOAA Hazardous Materials Response Division (HAZMAT)

16 HAZMAT provides critical advice on science and other natural resource issues to the
17 Federal On-Scene Coordinators (FOSCs) during the Federal government’s response to
18 coastal oil and hazardous materials spills or substantial threat of release. Scientific
19 Support Coordinators (SSCs) lead the scientific support team at spills, drawing on the
20 team’s spill trajectory estimates, chemical hazards analyses, and assessments of the
21 sensitivity of biological and human-use resources to help the FOSC make timely
22 operational decisions. NOAA spill response personnel work closely with the FOSC to
23 respond to about 100 accidental releases each year.

1 **III. REFERENCES AND AUTHORITIES**

4 **A. NOAA**

- 5 1. Costs incurred by NOAA or other entities for conducting scientific studies not in
6 support of the FOSCs' actions (40 CFR §300.33j (d)) are not covered under the
7 provisions of this MOU.
- 8 2. Public Law 102-567 authorizes the types of allowable costs to be reimbursed to
9 NOAA for spill response. The allowable costs include incremental and base
10 salaries, ships, aircraft, and associated indirect costs. Allowable costs do not
11 include base salaries and benefits of NOAA [Scientific] Support Coordinators.

13 **B. Coast Guard**

- 14 1. 40 CFR §300.145 provides for the FOSC to request and utilize a NOAA SSC as the
15 principal advisor for scientific issues, communication with the scientific
16 community, and coordination of requests for assistance from state and Federal
17 agencies regarding scientific studies.
- 18 2. Under 40 CFR § 300.322(c)(3), the lead agency or Regional Response Team (RRT)
19 shall dispatch appropriate personnel to the scene of the discharge to assist the FOSC
20 upon his request. This assistance may include technical support in the agency's
21 areas of expertise and disseminating information to the public. Where the USCG
22 FOSC requests assistance from a Federal agency, the parties will execute a
23 Pollution Removal Funding Authorization (PRFA) (NPFC Technical Operating
24 Procedures, Ch. 3) to govern reimbursement.
- 25 3. The USCG is the fiduciary for the Oil Spill Liability Trust Fund (OSLTF)
26 established under Title 26 USC 9509. OPA 90 and Presidential delegation have
27 assigned management of the use of the OSLTF to the USCG. The OSLTF is
28 available to pay oil removal costs that are consistent with the NCP (33 USC
29 2712(a)).

- 1 4. Section 104 of the Comprehensive Environmental Response, Compensation and
2 Liability Act of 1980 (CERCLA) authorizes the President to act "...whenever (a)
3 any hazardous substance is released or there is a substantial threat of such a release
4 into the environment, or (b) there is a release or substantial threat of release into the
5 environment of any pollutant or contaminant which may present an imminent and
6 substantial danger to the public health or welfare ..." Superfund is the source of
7 funds for CERCLA removal costs incurred by the USCG. Such costs are
8 reimbursed by the EPA via interagency agreements between the EPA and USCG.
9 The agreement and applicable instrument of redelegation covers costs incurred by
10 the USCG in carrying out functions related to immediate removal actions at
11 facilities and responses to releases or threats of releases from vessels. Costs
12 incurred by NOAA under CERCLA in support of the USCG are covered through
13 this MOU; NOAA's costs are reimbursed to the USCG through the USCG/EPA
14 interagency agreement to the extent NOAA's costs have not already been paid by
15 Superfund.
- 16 5. The FOSC and the trustees shall coordinate assessments, evaluations,
17 investigations, and planning that impacts removal actions. The FOSC shall consult
18 with the affected trustees on the appropriate removal action to be taken. The
19 trustees will provide timely advice concerning recommended actions with regard to
20 trustee resources potentially affected (40 CFR § 300.305(e)).
- 21 6. When requested by the FOSC, the lead agency or RRT shall dispatch appropriate
22 personnel to the scene of the release (of a hazardous substance) to assist the FOSC.
23 This assistance may include technical support in the agency's areas of expertise (40
24 CFR § 300.415(c)(3)(iii)).
- 25 7. Chapter 3 (Removal Actions-Oil & HAZMAT) of the National Pollution Funds
26 Center User Reference Guide provides guidance on the use of the OSLTF and
27 Superfund, along with applicable regulations and background information. The
28 Reference Guide is divided into topics that are briefly explained in Appendix A.
- 29
30

1 **IV. NOAA SUPPORT TO AN OIL OR HAZARDOUS MATERIALS SPILL**

3 **A. Scientific Support Team (SST) Support**

4 Depending upon the magnitude of the spill, HAZMAT SSCs can be supported by a
5 Scientific Support Team (SST). The expertise of the SST includes oil spill tracking;
6 pollutant transport modeling; biological assessments; evaluation of environmental
7 tradeoffs resulting from specific countermeasures and cleanup techniques; assessment
8 of natural resources at risk; environmental chemistry; chemical hazard assessment;
9 health and safety; and information management. The team may also be augmented by
10 other Federal, state, or academic experts and is tailored to the specific scientific
11 requirements of the incident and the local expertise available. During the response the
12 SSC and members of the SST work closely with the FOSC, staff, USCG's Marine
13 Safety Office personnel, and other response personnel to provide scientific advice and
14 other technical guidance. The SSC and specific members of the NOAA SST can serve
15 in many of the standard ICS positions as referenced in the USCG's Oil Spill Field
16 Operations Guide (ICS-OS-420-1). The SSC will recommend the number of team
17 members for each level and type of response.

19 **B. Other Support Services From NOAA**

20 NOAA data and resources to support a response may be requested by the FOSC from
21 the Department of Commerce (DOC) Regional Response Team (RRT) representative
22 through the SSC or through the RRT Co-chairs. This support might include tide and
23 circulation information; nautical charts; satellite imagery; meteorological, hydrologic,
24 ice, and oceanographic data for marine, coastal, and certain inland waters; information
25 on marine fisheries, marine mammals, and certain endangered species from NOAA's
26 National Marine Fisheries Service; technical support from NOAA's National Marine
27 Sanctuaries; use of the NOAA First Class and National Weather Service
28 communications networks; special-purpose HAZMAT aircraft and/or ships; and other
29 expertise within NOAA.

1 **V. POLLUTION REMOVAL FUNDING AUTHORIZATION (PRFA)**

2

3 The PRFA is a tool available to FOSCs for quickly obtaining needed removal services

4 and assistance from other government agencies in oil spill and/or hazardous materials

5 response actions. Appendix B includes detailed procedures for processing PRFAs. Using

6 a PRFA, the FOSC authorizes reimbursement to NOAA for services, equipment, and

7 support that were requested and approved by the FOSC. The NOAA SSC or DOC RRT

8 member will ensure the requested services and support are specified in an FOSC-

9 approved PRFA prior to providing said services and support. If oral requests are made by

10 the FOSC and agreed to by the NOAA SSC or DOC RRT member, the FOSC will

11 document the request using a PRFA as soon thereafter as possible. PRFA general terms

12 follow:

13

14 **A. Non-Reimbursable Costs**

- 15 1. NOAA will not seek reimbursement for costs associated with team members who
- 16 do not serve FOSC-approved response functions. Information about the specifics of
- 17 an incident is often sketchy during the first hours of a response. In these situations,
- 18 NOAA sometimes assembles and dispatches a team before the exact nature of the
- 19 response is known. This is the best way to ensure that the FOSC has timely support
- 20 during major spills. However, when team members are sent who do not fit the
- 21 response needs, NOAA will return those SST members to their origin.
- 22 2. NOAA will not seek reimbursement for the associated costs to send personnel to
- 23 participate in the response who are in training.
- 24 3. NOAA will not seek reimbursement for SSC regular salary costs.
- 25 4. NOAA will not seek reimbursement for other support services from NOAA or
- 26 participation by the DOC RRT member that were not FOSC requested or FOSC
- 27 approved.

28

29 **B. Reimbursable Costs: Costs of FOSC-approved support services to be reimbursed**

30 include, but are not limited to:

- 31 1. Personnel salary costs (excluding the SSC regular salary), including regular

- 1 salary, overtime, compensatory time, and, if applicable, holiday pay and hazardous
- 2 duty pay;
- 3 2. NOAA overhead costs for labor (distribution rates) as published annually by the
- 4 NOAA Comptroller;
- 5 3. Travel and per diem expenses;
- 6 4. Established charges for using NOAA-owned equipment or facilities, including
- 7 NOAA-owned aircraft, ships, and associated indirect costs;
- 8 5. Actual expenses authorized by the FOSC as removal costs.

9 10 C. Incident Cost Documentation File

- 11 1. HAZMAT's Program Support Group (PSG) will maintain each incident's cost
- 12 documentation file in accordance with Appendix C. PSG is responsible for all
- 13 budget and fiscal matters related to NOAA RRT members, SSCs, SSTs and other
- 14 NOAA components supporting a response.
- 15 2. The cost documentation file will include both reimbursable and non-reimbursable
- 16 costs. Reimbursable cost include costs for personnel who are not normally available
- 17 for oil spill removal, premium pay (overtime, hazardous duty pay, etc.) for all
- 18 personnel working at an incident, travel vouchers, contractor invoices, and other
- 19 charges related to an incident. The cost documentation must also include costs that
- 20 are recoverable from a responsible party, but not reimbursable to NOAA, such as
- 21 regular salary costs associated with personnel normally available for oil spill
- 22 removal (SSC).
- 23 3. PSG will provide a status report of NOAA costs by incident to NPFC for all
- 24 incidents for the current fiscal year upon request.

25 26 D. Equipment

- 27 1. NOAA may request reimbursement for repair or replacement of equipment that is
- 28 damaged or lost during an incident. The request should describe the cause of the
- 29 loss, and any efforts to avoid or minimize damage. The NPFC will consider the
- 30 merits of reimbursement for repairing or replacing the damaged or lost equipment
- 31 on a case-by-case basis. Reimbursement will not be allowed for equipment that is

1 damaged as a result of normal wear-and-tear, neglect, alteration, or improper use,
2 including failure to follow instructions for operation, maintenance, and use under
3 specific environmental conditions prescribed in the equipment manuals. NOAA
4 will not seek reimbursement for use of an item of equipment when the equipment's
5 replacement is also reimbursed.

- 6 2. Consumable equipment remaining at the completion of removal action should be
7 disposed of in a cost-effective manner. Multiple items of consumable equipment in
8 lots having a cost per lot of over \$1,000 shall be treated as non-consumables.
9 NOAA shall forward to NPFC documentation such as Form DD-1348 or other
10 evidence of disposal/disposition action taken for all non-consumable equipment and
11 consumables in lots worth more than \$1,000. Non-consumable equipment
12 includes items costing over \$1,000 and items of lower cost but high interest (e.g.,
13 radios, FAX machines, cellular phones, computers, pagers, copiers, photographic
14 equipment, protective clothing, test equipment). Costs, including shipping and
15 transportation costs, for disposal/disposition, are reimbursable via the PRFA.

16
17 E. Cost Documentation

18 A copy of the cost documentation to support the charges will be provided to the
19 Incident NPFC Case Officer, when requested (see Appendix C).

20
21 F. Billing

22 To obtain reimbursement for eligible costs, NOAA shall present a bill to the FOSC
23 with a copy to the NPFC. See Appendix B for procedures.

1 **VI. MODIFICATION AND TERMINATION**

2
3 Either the USCG or NOAA may propose changes to this MOU. Both agencies must
4 approve a change before it becomes effective. Either agency may terminate the MOU by
5 giving a 30-day advance written notice to the other agency. Adding or changing
6 appendices does not constitute modification of the overall MOU.

7 Such additions and/or changes may be made by agreement of officials responsible for the
8 specific subject area in the USCG and NOAA. The officials making any such change
9 shall immediately bring the change to the attention of the signers of this MOU, or their
10 successors, and then shall disseminate the change to inform all users of the MOU.

11
12 **VII. OTHER PROVISIONS**

13
14 Nothing herein is intended to conflict with current NOAA or USCG directives. If the
15 terms of this agreement are inconsistent with existing directives of either of the agencies
16 entering into this agreement then those portions of this agreement which are determined
17 to be inconsistent shall be invalid; but the remaining terms and conditions not affected by
18 the inconsistency shall remain in full force and effect. At the first opportunity for review
19 of the agreement, all necessary changes will be accomplished by either an amendment to
20 this agreement or by entering into a new agreement, whichever is deemed expedient to
21 the interest of both parties.

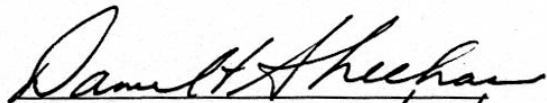
22
23 Should disagreement arise on the interpretation of the provisions of this agreement, or
24 amendments and/or revisions thereto, that cannot be resolved at the operating level, the
25 area(s) of disagreement shall be stated in writing by each party and presented to the other
26 party for consideration.

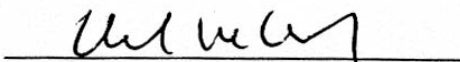
1 **VIII. PERIOD OF AGREEMENT**

2
3 This MOU shall continue to be in effect until terminated, modified, or amended.

4 This MOU shall become effective on the date of the last signature below.

5
6 **IX. SIGNATURES**

7

Date 8/30/99


Date 9/15/99

8 Daniel F. Sheehan
9 Director
10 National Pollution Funds Center
11 United States Coast Guard
12 4200 Wilson Blvd, Suite 1000
13 Arlington, VA 22203-1804

Mr. David Kennedy
Director, Office of Response & Restoration
National Ocean Survey
National Oceanic & Atmospheric
Administration
1305 East-West Highway
SSMC4, Station 9232
Silver Spring, MD 20910-3281

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APPENDIX A

NPFC USER REFERENCE GUIDE

NPFC publishes the NPFC User Reference Guide. It provides guidance on the use of the OSLTF and Superfund, along with applicable regulations and background information. Due to its extensive nature, the material is published separately as a Supplement to the Marine Safety Manual. The NPFC shall provide PSG with the most current version of the NPFC User Reference Guide. The Reference Guide is divided into a series of topics briefly explained as follows.

1. Organizations Using Pollution Funds. This provides information on entities able to access the Funds managed by NPFC and includes: MSOS, G-M, G-MOR, Strike Teams, PIAT, EPA, MECs, FINCEN, Other Federal Agencies, States, and Trustees.
2. Introduction to NPFC. This describes the origins, roles, missions, case teams, regions, functional contacts, and frequently used acronyms.
3. Removal Actions. This provides procedures for accessing the Funds for Clean Water Act and CERCLA removals. It includes FOSC financial management checklists, guidance on mystery spills, ACP guidance, and reports. The Technical Operating Procedures (TOPS) for Removal Costs and the TOPS for Resource and Cost Documentation are included in this chapter.
4. Investigative Considerations. This addresses liability limits, proximate cause, designation of source, notification advertising, and potential responsible parties.
5. State Access. This includes the State Access TOPS and the State Access regulations issued under OPA, Section 1012(d)(1). It also addresses procedures to be used by states for requesting funds, removal costs, pollution reports, payment, litigation, and cooperative agreements.
6. Natural Resource Damage Assessments. This includes the NRDA/Initiate TOPS, which contains initiation criteria, purchase of property, reporting, and requests for reimbursement.

1 7. Claims. This includes the Claims regulations and the Claimant's Information Guide, which
2 explain available compensation, filing a claim, notice of designation, advertising, and the
3 settlement process.

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UNDER THE POLLUTION REMOVAL FUNDING AUTHORIZATION (PRFA)

I. Execution Phase

- A. Following a request for NOAA support services, the Scientific Support Coordinator (SSC) or SSC representative will notify and provide HAZMAT's Program Support Group (PSG) with information pertaining to resource utilization and the associated FPN or CPN (Federal Project Number for oil incidents, CERCLA Project Number for hazardous substance incidents), FOSC (or representative), and telephone number.
- B. PSG will prepare an estimate of actual costs for resources used and pre-approved by the FOSC. The estimate is sent to the FOSC (or representative) and the NPFC case officer.
- C. The FOSC (or representative) will provide PSG with a Pollution Removal Funding Authorization (PRFA). The PRFA documents the pollution incident name, identification number (FPN or CPN), funding limit point of contact, and FOSC billing address.
- D. The PSG confers with the SSC when costs incurred begin to reach the PRFA funding limit. Updates to NOAA's estimated costs are provided to the FOSC through the SSC and to the NPFC as needed but no more than twice during a seven-day period.
- E. PSG provides the FOSC and NPFC with the updated cost estimate from which the FOSC develops a PRFA amendment. Depending on the length of the response, the PRFA may be amended several times.

2. Reimbursement of Expenses

- A. PSG collects all cost documentation associated with an incident as costs are incurred. (See Section 3 for reimbursement procedure for the post performance audit charges.)
- B. PSG reviews the incident file with NOAA's financial management information system to determine if chargeable costs are accurate and makes any corrections.
- C. Once all incident costs are accurately recorded in NOAA's financial management system or 120 days after removal activities are complete (whichever comes first), PSG prepares a cost spreadsheet billing for submission to the NPFC via the incident FOSC. The FOSC must verify that the actual costs on the spreadsheet are for resources that were used as approved during the specific incident. The spreadsheet will cite: 1) the pollution incident name, 2) FPN or CPN identification number and 3) an incident-specific breakdown of charges.
- D. Concurrently, PSG notifies the Office of Response and Restoration (OR&R), HAZMAT's parent organization, to initiate a request to the NOAA Comptroller's office to prepare an SF-1081 that is sent to the FOSC, copy to NPFC, within 120 days after removal activities are complete. The SF-1081 includes the agency's address, agency location code, fiscal year, Treasury symbol, and task code associated with the billing costs.
- The address and agency location code of the NPFC are:
- (Case officer name)
National Pollution Funds Center (cm)
4200 Wilson Boulevard, Suite 1000
Arlington, VA 22203-1804
Re: FPN _____
Agency Location Code: 69-025102
- E. The Coast Guard FOSC and NPFC will review NOAA's SF-1081 billing, authorize it for payment, and forward it to the USCG Finance Center within 30 days of receipt, unless there are substantial problems with the SF-1081 package. Reimbursement is accomplished through the OPAC (On Line Payment and Collection) System.
- F. In the event of a lengthy or large incident, NOAA will submit an interim billing as agreed upon between the NPFC case officer and PSG. The interim billing process uses the same procedures as outlined in A through E above.

3. Post-Performance Audit Charges

NOAA cost reimbursable contracts are subject to post-performance audits and the audit may produce additional charges or a credit for an overcharge for incident specific work performed. The audit is performed at the end of the contract (contracts are usually five years) and additional charges or overcharges, if any, are usually known within one year following audit initiation. NOAA's policy [NOAA Budget Handbook Chapter 2, Section 3.1.b.(4)], is to recover full costs, both direct and indirect, for performance of services for others. Direct costs include any pay increases that might be approved after negotiation of the agreement (PRFA) and any overruns in cost that are incurred in performance of the agreement.

- A. PSG will notify the NPFC that a contract is under a post-performance audit review and the incidents that are associated with the contract.
- B. If the audit identifies an additional cost, PSG will bill the NPFC for the post-performance audit charge. If the audit identifies that NOAA overcharged and was reimbursed too much, PSG will prepare a refund using the OPAC process.
- C. Once post-performance audit charges or overcharges are accurately recorded in NOAA's financial management system, PSG prepares a cost spreadsheet billing with the post performance audit charges/refund for submission to the NPFC. The spreadsheet will cite: 1) each pollution incident name associated with the contract, 2) FPN or CPN identification number, and 3) the post-performance audit charge/refund.
- D. Concurrently, PSG notifies OR&R to initiate a request to the NOAA Comptroller's office to prepare an SF-1081 that is sent to the NPFC within 60 days after the audit. The SF-1081 includes the agency's address, agency location code, fiscal year, Treasury symbol, and task code associated with the billing costs. The address and agency location code of the NPFC is:

National Pollution Funds Center (cf)
4200 Wilson Boulevard, Suite 1000
Arlington, VA 22203-1804
Re: FPN _____
Agency Location Code: 69-025102
- E. NPFC will review NOAA's SF-1081 billing, authorize it for payment, and forward it to the USCG Finance Center within 30 days of receipt, unless there are substantial problems with the SF-1081 package. Reimbursement or refunds are accomplished through the OPAC (On Line Payment and Collection) System.

APPENDIX C

COST DOCUMENTATION

NOAA shall produce a comprehensive written record supporting all expenditures and costs incurred in each removal. This documentation will support reimbursement of NOAA costs and NPFC's cost recovery on behalf of the OSLTF. NOAA will use an alternate method of record keeping for cost documentation rather than the standard resource documentation procedures outlined in NPFC User Reference Guide. Time sheets, payroll reports, travel orders, etc., must be redacted to remove data protected by the Privacy Act such as social security numbers.

1. NOAA Personnel Costs. Documentation must show each employee's name, grade, hours, function, appropriate subtotals, and an overall total. In addition, NOAA must indicate whether the employee is Off Site or On Scene. NOAA must include copies of the Civilian Time and Attendance Daily Reports, CD-440PC, indicating incident-specific hours. NOAA Corps Officers are not required to maintain a CD-440PC, but will record incident-specific hours on a Timekeeping Record Worksheet.
2. NOAA Travel Costs. Incident-specific travel documentation will include copies of each Travel Order, CD-29, or NOAA Form 56-1 for Corps Officers; Travel Voucher, CD-370, with supporting receipts as required by the applicable Federal travel regulations; and/or Claim for Reimbursement for Expenditures on Official Business, SF-1164, with appropriate subtotals and an overall total.
3. Contractor Costs. Documentation must include copies of the contract incident-specific tasking orders (technical directions), modifications (where applicable), statements of work, and invoices associated with incident-specific costs. Contractor costs will have appropriate subtotals and an overall total.
4. Other NOAA Costs. Documentation for transportation, rents/leases, and supplies/equipment will be included when applicable.

**Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the
Federal Water Pollution Control Act's
National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act**

INTRODUCTION

- A. Parties. The Parties to this agreement are the U.S. Coast Guard (USCG), the U.S. Environmental Protection Agency (USEPA), the Department of the Interior (DOI) Office of Environmental Policy and Compliance, the U.S. Fish and Wildlife Service (USFWS), and the National Oceanic and Atmospheric Administration's (NOAA's) - National Marine Fisheries Service (NMFS) and National Ocean Service (NOS).
- B. The Parties have conducted a review of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) and associated oil spill response activities to coordinate their actions under Section 1321(d) of the Clean Water Act and Section 7(a)(1) of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*) (ESA). Section 1321(d) of the Clean Water Act establishes the NCP and assigns responsibilities to Federal agencies in mitigating damage from oil and hazardous materials spills, including the conservation of fish and wildlife. Section 7(a)(1) of the ESA requires all Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior or Commerce, as appropriate, to review their programs and utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. As a result of this review, recommended procedures have been developed that will achieve better conservation of listed species and critical habitat during implementation of oil spill response activities.
- C. This agreement provides a general framework for cooperation and participation among the Parties in the exercise of their oil spill planning and response responsibilities. Following the recommended procedures presented in this agreement will better provide for the conservation

of listed species, improve the oil spill planning and response procedures delineated in the NCP, and ultimately streamline the process required by Section 7(a)(2) of the ESA.

PURPOSE

A. This agreement is intended to be used at the area committee level primarily to identify and incorporate plans and procedures to protect listed species and designated critical habitat during spill planning and response activities. Proactive regional planning may also take into consideration concerns for proposed and candidate species, as well as listed species' habitat not yet designated as critical.¹

B. This agreement coordinates the consultation requirements specified in the ESA regulations, 50 CFR 402, with the pollution response responsibilities outlined in the NCP, 40 CFR 300. It addresses three areas of oil spill response activities: pre-spill planning activities, spill response event activities, and post-spill activities. The agreement identifies the roles and responsibilities of each agency under each activity. By working proactively before a spill to identify potential effects of oil spill response activities on listed species and critical habitat, and jointly developing response plans and countermeasures (response strategies) to minimize or avoid adverse effects, impacts to listed species and critical habitat should be reduced or avoided completely. Should a spill occur, response plans and countermeasures will be used to implement response actions to minimize damage from oil discharges in a manner that reduces or eliminates impacts to listed species and critical habitat. In the event that oil spill response actions may result in effects on listed species or critical habitat, the agreement provides guidance on how to conduct emergency consultation under the ESA. It also describes the steps for completing formal consultation, if necessary, after the case is closed, if listed species or critical habitat have been adversely affected.

C. The goal of this agreement is to engage in informal consultation wherever possible during planning and response. With adequate planning and ongoing, active involvement by all participants, impacts to listed species and critical habitat and the resulting need to conduct subsequent ESA Section 7(a)(2) consultations will be minimized or obviated.

LEGAL AUTHORITIES

A. The Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1321., requires that when a spill occurs, the President take such action as necessary to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial risk of a discharge of oil into the waters of the United States. The National Contingency Plan (NCP), 40 CFR Part

¹ Adverse effects on non-designated critical habitat used by listed species has a potential for having an adverse affect on these listed species. Therefore, planners should consider these areas if information is available.

1 300, prepared in accordance with the FWPCA, assigns duties to Federal agencies to protect
2 the public health and welfare, including fish, wildlife, natural resources and the public. The
3 NCP designates the Federal On Scene Coordinator (FOSC) as the person responsible for
4 coordinating an oil spill response. (The abbreviation OSC is used in the NCP, while the
5 abbreviation for Federal On Scene Coordinator is FOOSC in this agreement.) Nothing in this
6 agreement limits the authority of the Federal On Scene Coordinator as defined in the NCP.
7

- 8 B. The Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §1531 et seq., provides
9 a means to protect threatened and endangered species and the ecosystems upon which they
10 depend. The ESA requires that Federal agencies insure that the actions they authorize, fund,
11 or carry out do not jeopardize listed species or adversely modify their designated critical
12 habitat. Regulations for conducting Section 7 consultation are set forth in 50 CFR Part 402.
13

1
2 DEFINITIONS
3

4 The following definitions apply to this agreement and are taken from the definitions contained in
5 either the NCP or the March 1998 USFWS & NMFS Endangered Species Consultation
6 Handbook. For definitions of terms not listed below, refer to the USFWS & NMFS Endangered
7 Species Consultation Handbook and the NCP as appropriate.
8

9 *Area Committee* - the entity appointed by the President consisting of members from qualified
10 personnel of Federal, state, and local agencies with responsibilities that include preparing an area
11 contingency plan for an area designated by the President. The chairs of the Area Committee are
12 the USCG for coastal and Great Lakes plans, and the USEPA for inland plans. In some instances
13 the Regional Response Team (RRT) may act as the Area Committee. In this MOA, the term
14 Area Committee also includes the RRT acting as the Area Committee.
15

16 *Area Contingency Plan (ACP)* - the plan prepared by an Area Committee (or the RRT acting as
17 the Area Committee) that is developed to be implemented in conjunction with the NCP and
18 Regional Contingency Plan (RCP), in part to address removal of a worst case discharge and to
19 mitigate or prevent a substantial threat of such a discharge from a vessel, offshore facility, or
20 onshore facility operating in or near an area designated by the President. A detailed annex
21 containing a Fish and Wildlife and Sensitive Environments Plan prepared in consultation with
22 the USFWS, NOAA, and other interested natural resource management agencies should be
23 incorporated into each ACP. In this MOA, the term ACP also includes sub-area ACP's, sub-area
24 contingency plans, geographic response plans and geographic response strategies as per 40 CFR
25 300.210.
26

27 *Biological Assessment* - information prepared by or under the direction of the Federal action
28 agency (USCG or USEPA) regarding: 1) listed and proposed species and designated critical
29 habitat that may be affected by proposed actions; and, (2) the evaluation of potential effects of
30 the proposed actions on such species and habitat.
31

32 *Biological Opinion* - document which includes: (1) the opinion of the USFWS or NMFS as to
33 whether or not a Federal action is likely to jeopardize the continued existence of listed species, or
34 result in the destruction or adverse modification of designated critical habitat; (2) a summary of
35 the information on which the opinion is based; and (3) a detailed discussion of the effects of the
36 action on listed species or designated critical habitat. This document will also contain an
37 incidental take statement, that, if appropriate, exempts the Federal actions from the ESA Section
38 9 take prohibitions.
39

40 *Candidate species* – plant and animal taxa considered for possible addition to the List of
41 Threatened and Endangered Species.
42

43 *Case is Closed* – When removal operations are complete in accordance with 40 CFR 300.320(b).
44

45 *Critical habitat* - areas designated by the USFWS and NMFS pursuant to Section 4 of the ESA
46 for the purposes of identifying areas essential for the conservation of a threatened or endangered
47 species and which may require special management considerations.

1
2 *Emergency Consultation* – an expedited consultation process that takes place during an
3 emergency (natural disaster or other calamity) (50 CFR 402.05). The Services have determined
4 that oil spill response activities qualify as an emergency action. The consultation may be initiated
5 informally. The emergency continues to exist until the removal operations are completed and the
6 case is closed in accordance with 40 CFR 300.320(b). The FOSC will continue to conduct
7 emergency consultations, if needed, until the emergency is over and the case is closed. Formal,
8 or informal, consultation is initiated after the emergency is over, at which time the USFWS
9 and/or NMFS evaluates the nature of the emergency actions, the justification for the expedited
10 consultation, and any impacts to listed species and their habitats.

11
12 *Federal On Scene Coordinator (FOSC)* - the Federal official predesignated by USEPA or the
13 USCG to coordinate and direct responses under the FWPCA as defined in the NCP.

14
15 *Formal Consultation*² - a process between USFWS or NMFS and the Federal action agency
16 (USCG or USEPA) that: (1) determines whether a proposed Federal action is likely to jeopardize
17 the continued existence of listed species or destroy or adversely modify designated critical
18 habitat; (2) begins with a Federal agency's written request and submission of a complete Section
19 7 consultation initiation package; and (3) concludes with the issuance of a biological opinion and
20 incidental take statement, as appropriate, by either of the Services. If a proposed Federal action
21 may affect a listed species or designated critical habitat, formal consultation is required (except
22 when the Services concur, in writing, that a proposed action "is not likely to adversely affect"
23 listed species or designated critical habitat. See informal consultation).

24
25 *Incidental Take* - take of listed fish or wildlife species that results from, but is not the purpose of,
26 carrying out an otherwise lawful activity conducted by a Federal agency or applicant.

27
28 *Informal Consultation* - an optional process that includes all discussions and correspondence
29 between the USFWS or NMFS and the Federal agency (USCG or USEPA) or designated non-
30 Federal representative, prior to formal consultation, to determine whether a proposed Federal
31 action may affect listed species or critical habitat. This process allows the Federal agency to
32 utilize the Services' expertise to evaluate the agency's assessment of potential effects or to
33 suggest possible modifications to the proposed action, which could avoid potential adverse
34 effects. If a proposed Federal action may affect a listed species or designated critical habitat,
35 formal consultation is required (except when the Services concur, in writing, that a proposed
36 action "is not likely to adversely affect" listed species or designated critical habitat).

37
38 *Listed Species* – for the purposes of this MOA, any species of fish, wildlife or plant, which has
39 been determined to be endangered or threatened under Section 4 of the ESA.

40
41 *National Contingency Plan (NCP)* – National Oil and Hazardous Substances Pollution
42 Contingency Plan. The NCP is a national plan that provides the organizational structure and
43 procedures for preparing for and responding to discharges of oil and releases of hazardous
44 substances, pollutants and contaminants. The NCP is set forth in 40 CFR 300.

² Formal consultation can occur during planning or after the conclusion of emergency consultation if listed species or critical habitat have been affected.

1
2 *National Response Team (NRT)* - a national team, defined under the NCP, responsible for
3 national planning, policy, and coordination for hazardous substance and oil spill preparedness
4 and response, consisting of representatives from agencies named in 40 CFR 300.175(b).

5
6 *Regional Response Team (RRT)* - a regional team of agency representatives that acts in two
7 modes: the standing RRT and incident specific RRT. The Co-chairs are the USCG and USEPA.
8 The standing team is comprised of designated representatives from each participating Federal
9 agency, state governments and local governments (as agreed upon by the states). Incident-
10 specific teams are formed from the standing team when activated for a response. The role of the
11 standing RRT includes establishing regional communications and procedures, planning,
12 coordination, training, evaluation, preparedness and related matters on a region-wide basis. It
13 also includes assisting Area Committees in coordinating these functions in areas within their
14 specific regions. The role and composition of the incident-specific team is determined by the
15 operational requirements of the response. During an incident, it is chaired by the agency
16 providing the FOSC.

17
18 *Services* – Term used to refer to both the USFWS and NMFS.

19 20 PROCEDURES

21
22 Oil spill planning and response procedures are set forth in the NCP. This agreement is intended
23 to facilitate compliance with the ESA without degrading the quality of the response conducted by
24 the FOSC, to improve the oil spill planning and response process, and ensure continued inter-
25 agency cooperation to protect, where possible, listed species and critical habitat.

26 27 A. *PRE-SPILL PLANNING*

28
29 (1) While drafting Area Contingency Plans themselves may not result in effects to listed species,
30 actions implemented under the plans may. It is essential that the Area Committee engage
31 USFWS and NMFS during the ACP planning process while developing or modifying the
32 ACP and response strategies. This informal consultation can be used to determine the
33 presence of listed species or critical habitat, and the effects of countermeasures, and to ensure
34 that measures to reduce or avoid impacts to listed species and critical habitats during oil spill
35 response activities are developed. By consulting on the anticipated effects prior to
36 implementing response actions, decisions can be made rapidly during the spill, harm from
37 response actions can be minimized, and implementation of response strategies specifically
38 designed to protect listed species and critical habitat can be achieved.

39
40 (2) The pre-spill planning process is shown as a flow chart in Appendix A. The Area Committee
41 Chair will request, in writing, that endangered species expertise and a species list be provided
42 by the Services.³ The request should also describe the area and include a general description
43 of the countermeasures being considered and the planning process to be used (e.g., a
44 workgroup). In order to document the request for consultation and planning involvement, the
45 request shall be sent to both NOAA and USFWS. To obtain NMFS assistance, a request

³ 40 CFR 300.170(a).

1 should be sent to the Department of Commerce (DOC) RRT representative, with a copy to
2 the NOAA Scientific Support Coordinator (SSC) and the NMFS Regional Field Office. For
3 USFWS support, a request should be sent to the local USFWS field office(s), with a copy to
4 the USFWS Regional Response Coordinator (RRC) at the appropriate USFWS Regional
5 Office(s) and the DOI RRT representative. It is the responsibility of the USFWS RRC,
6 acting through the Ecological Services Assistant Regional Director, and the NOAA SSC to
7 act as a liaison between the respective Service and the Area Committee. USFWS and NMFS
8 will orally respond to the request within 30 days of receipt and provide a written response
9 within 60 days. The response should include designation of a listed species expert to assist
10 the Area Committee.

- 11
- 12 (3) If listed species or critical habitat are present in the planning area being considered the Area
13 Committee should use a planning process that ensures engagement of Service experts.⁴ This
14 process shall ensure that the appropriate participants jointly gather and analyze the
15 information needed to complete the Planning Template in Appendix C. This planning
16 process constitutes informal consultation.⁵ The goals of this planning process are to identify
17 the potential for oil spill response activities to adversely affect listed species and critical
18 habitat and to identify for inclusion in the ACP information on sensitive areas, emergency
19 response notification contacts, and any other information needed. Methods should be
20 developed to minimize identified adverse effects and, where necessary, the plan should be
21 modified accordingly. If specific sources of potential adverse effects are identified and
22 removed, the Services will provide a concurrence letter and Section 7(a)(2) requirements will
23 be deemed to have been met.⁶
- 24
- 25 (4) If, after the process in Appendix C has been followed, it cannot be determined that adverse
26 effects will not occur during a response action, the USCG or USEPA, as appropriate, will
27 initiate formal consultation using the information gathered in Appendix C; this information
28 will be used by the Services to complete formal consultation.⁷ This will be a programmatic
29 consultation that generally addresses oil spill response activities at issue in the plan area. At
30 times when specific information is available about certain oil spill response methods and
31 listed species and critical habitat, it may be possible to pre-approve particular activities that
32 may be implemented in the event there is insufficient time to initiate emergency consultation
33 before the need to take action.⁸
- 34
- 35 (5) All parties recognize that development and modification of the ACP is an ongoing process.
36 Changes, including modifications to response actions or changes to the species list, should be
37 addressed regularly through a dynamic planning process. The Services should contact the

⁴ Process options include using an informal workgroup; formal workgroup, Environmental Risk Assessment process, or other process based on Area Committee needs.

⁵ This process does not negate any regional consultations that have already occurred, nor alter the strategies/procedures in the ACP until the ACP is officially modified in consultation with USFWS or NMFS.

⁶ Letter is required for the administrative record. See Appendix E.

⁷ Letter is required for the administrative record. See Appendix E.

⁸ Due to time constraints associated with spill response, this does not mean that immediate spill response actions cannot occur to meet the requirements of 40 CFR 300.317. However, planning should address specific procedures for initiating emergency consultation for activities that are pre-approved and for those that have not been pre-approved.

Area Committee or workgroup if they become aware of newly listed species that may be affected by planned response activities. The Area Committee should likewise notify the Services of changes to planned response activities. The Area Committee or workgroup should evaluate any changes and assess the need for additional consultation as needed.

B. OIL SPILL RESPONSE

During an oil spill event which may affect listed species and/or critical habitat, emergency consultations under the ESA are implemented (50 CFR 402.05) for oil spill response actions.⁹ Emergency consultation may be conducted informally through the procedures that follow (See Appendix A). Emergency consultation procedures allow the FOSC to incorporate listed species concerns into response actions during an emergency. “Response” is defined in this agreement as the actions taken by the FOSC in accordance with the NCP. The FOSC conducts response operations in accordance with the NCP and agreement established in the ACP.

- (1) As per the NCP and ACP, the FOSC will notify the RRT representatives of DOI and DOC through the established notification process regardless of whether listed species or critical habitat is present. Upon notification, the DOC and DOI representatives shall contact the NOAA SSC and RRC, respectively, and other appropriate Service contacts as provided in internal DOC or DOI plans, guidance, or other documents. If established in the ACP, the FOSC may also contact the Service regional or field offices directly (see Section V(A)(3) above). If listed species and/or critical habitat are present or could be present, the FOSC shall initiate emergency consultation by contacting the Services. The NOAA SSC and RRC shall coordinate appropriate listed species expertise. This may require timely on-scene expertise from the Services’ local field offices. These Service representatives may, as appropriate, be asked by the FOSC to participate within the FOSC’s Incident Command System and provide information to the FOSC.¹⁰
- (2) The ACP, including any agreed upon references cited in the ACP, should form the basis for immediate information on response actions. As part of emergency consultation, the Services shall provide the FOSC with any timely recommendations to avoid and/or minimize impacts to listed species and critical habitat.¹¹ The NOAA SSC should also be involved in these communications as appropriate. If incidental take is anticipated, and if no means of reducing or avoiding this take are apparent, the FOSC should also be advised and the incidental take documented. If available, the FOSC should consider this information in conjunction with the national response priorities established in the NCP.¹² The FOSC makes the final determination of appropriate actions.
- (3) It is the responsibility of both the FOSC and the Services’ listed species representatives to maintain a record of written and oral communications during the oil spill response. The checklist contained in Appendix B is information required to initiate a formal consultation in those instances where listed species and/or critical habitat have been adversely affected by

⁹ Based on pre-spill planning or discovered during the response.

¹⁰ 40 CFR 300.175(b)(7) & (b)(9); 40 CFR 300.305(e).

¹¹ See Section 8.1 of the USFWS & NMFS Endangered Species Consultation Handbook (<http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>).

¹² 40 CFR 300.317 National Response Priorities.

1 response actions.¹³ If it is anticipated that listed species and/or critical habitat may be
2 affected, the FOSC may request that the USFWS and/or NMFS representative to the Incident
3 Command System oversee and be responsible for the gathering of the required information in
4 Appendix B while the response is still ongoing.¹⁴ The FOSC may also choose to designate
5 another individual to be responsible for collecting the information.¹⁵ Although in some
6 instances the drafting of information for Appendix B may be completed after field removal
7 operations have ceased, it is anticipated that collection of the information should be complete
8 before the case is officially closed and that no further studies will be necessary.
9

- 10 (4) It is the responsibility of the FOSC to notify the Services' representatives in the Incident
11 Command System of changes in response operations due to weather, extended operations, or
12 some other circumstance. It is the responsibility of the Services to notify the FOSC of
13 seasonal variances (e.g., bird migration), or other natural occurrences affecting the resource.
14 If there is no Service representative in the Incident Command System, the FOSC will ensure
15 that the NOAA SSC and/or DOI representative to the RRT remains apprised of the situation.
16 The Services will continue to offer recommendations, taking into account any changes, to
17 avoid jeopardizing the continued existence of listed species or adversely modifying critical
18 habitat, and to minimize the take of listed species associated with spill response activities.
19

¹³ See Section 8.2(B) of the USFWS & NMFS Endangered Species Consultation Handbook.

¹⁴ If requested by the FOSC, the NOAA Scientific Support Coordinator (SSC) may coordinate this data collection.

¹⁵ See Appendix D for example Pollution Removal Funding Authorization (PRFA) Statement of Work language.

1
2 *C. POST RESPONSE*
3

4 If listed species or critical habitat have been adversely affected by oil spill response activities, a
5 formal consultation is required, as appropriate.¹⁶ Informal emergency consultation shall remain
6 active until the case is closed. The FOSC will initiate consultation on the effect of oil spill
7 response activities (not the spill itself) after the case is closed. Every effort shall be made to
8 ensure that relevant information generated as part of the consultation process is made available
9 for use in the Natural Resource Damage Assessment (NRDA) process. (Note: NRDA activities
10 are separate from this consultation.)
11

- 12 (1) After the FOSC determines that removal operations are complete in accordance with 40 CFR
13 300.320(b), the impacts of the response activities on listed species and critical habitat will be
14 jointly evaluated by the FOSC and the Services.
15
- 16 (2) If listed species or critical habitat were adversely affected by oil spill response activities, the
17 FOSC will follow the procedural requirements of 50 CFR 402.05(b) (see Appendix A). The
18 document developed by following Appendix B, information required to initiate a formal
19 consultation following an emergency, should be included with a cover letter to the Services
20 requesting consultation and signed by the FOSC. The FOSC will work with the Services and
21 the NOAA SSC, as appropriate, to ensure that Appendix B is complete.¹⁷ This document
22 comprises the FOSC's formal request for consultation.
23
- 24 (3) The Services normally issue a biological opinion within 135 days of receipt of the Section 7
25 consultation request (50 CFR 402.14). When a longer period is necessary, and all agencies
26 agree, the consultation period may be extended. The final biological opinion will be
27 prepared by the Services and provided to the FOSC, USFWS RRC, NOAA SSC, DOI and
28 DOC RRT members, and the Area Committee Chair so that recommendations can be
29 reviewed by the Area Committee, and where appropriate, implemented to minimize and/or
30 avoid effects to listed species and critical habitat from future oil spill response actions.¹⁸ The
31 result of the consultation should be considered by the FOSC for inclusion in a lessons
32 learned system so changes can be made to the ACP, as necessary, for the benefit of future oil
33 spill response actions. If such changes to the ACP modify the anticipated effects to listed
34 species or critical habitat, the Services should appropriately document the anticipated
35 changes in future effects and complete any appropriate administrative steps.
36

¹⁶ If only proposed species or proposed critical habitat have been adversely affected, a formal consultation is not required; however, ESA conference procedures should be followed as appropriate. See the USFWS & NMFS Endangered Species Consultation Handbook for conference information.

¹⁷ The NOAA SSC may also assist.

¹⁸ Recommendations may also be provided for addressing effects caused by spill response actions. This information should be provided to the NRDA process as appropriate.

1
2 **VI. Points of Contact.** The following are the points of contact for each Party:

3
4 USCG: Chief, Office of Response, Coast Guard Headquarters (G-MOR), (202) 267-0516.

5
6 USEPA: Oil Program Center, U.S. Environmental Protection Agency, (703) 603-8823.

7
8 NOAA - NMFS: Section 7 Coordinator, Endangered Species Division, Office of Protected
9 Resources, (301) 713-1401.

10
11 USFWS: National Spill Response Coordinator, U.S. Fish and Wildlife Service, Division of
12 Environmental Quality, (703) 358-2148.

13
14 NOAA - NOS: Director, Office of Response and Restoration, (301) 713-2989 x101.

15
16 DOI: Office of Environmental Policy and Compliance, (202) 208-6304.

17
18 **VII. Funding and Resources.** This agreement is not a fiscal or funds obligation document.
19 Nothing in this agreement shall be construed as obligating any of the Parties to the expenditure
20 of funds in excess of appropriations authorized by law or otherwise commit any of the Parties to
21 actions for which it lacks statutory authority. It is understood that the level of resources to be
22 expended under this agreement will be consistent with the level of resources available to the
23 Parties to support such efforts. Any activities involving reimbursement or contribution of funds
24 between the Parties to this agreement will be handled in accordance with applicable laws,
25 regulations and procedures. Such activities will be documented in separate agreements with
26 specific projects between the Parties spelled out. The separate agreements will reference this
27 general agreement.

28
29 **VIII. Effective Date.** The terms of this agreement are effective upon signature by all Parties.

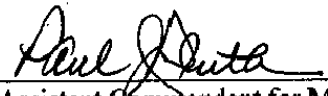
30
31 **IX. Modification.** This agreement may be modified upon the mutual written consent of the
32 Parties.

33
34 **X. Termination.** The terms of this agreement, as modified, with the consent of all Parties, will
35 remain in effect until terminated. Any Party upon 60 days written notice to the other Parties may
36 terminate their involvement in this agreement.

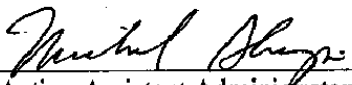
1 Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the
2 Federal Water Pollution Control Act's
3 National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered
4 Species Act
5
6

Approved By:

Date:


Assistant Commandant for Marine Safety
and Environmental Protection
U.S. Coast Guard

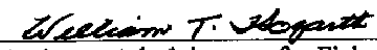
5/25/01


Acting Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

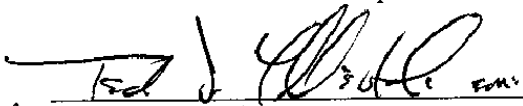
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Acting Director
U.S. Fish and Wildlife Service

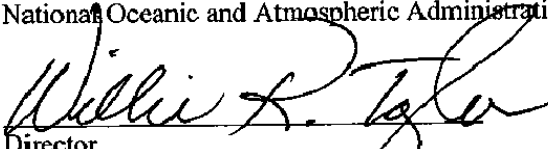
8 June 2001


~~Acting~~ Assistant Administrator for Fisheries
National Marine Fisheries Service
National Oceanic and Atmospheric Administration

5/15/01

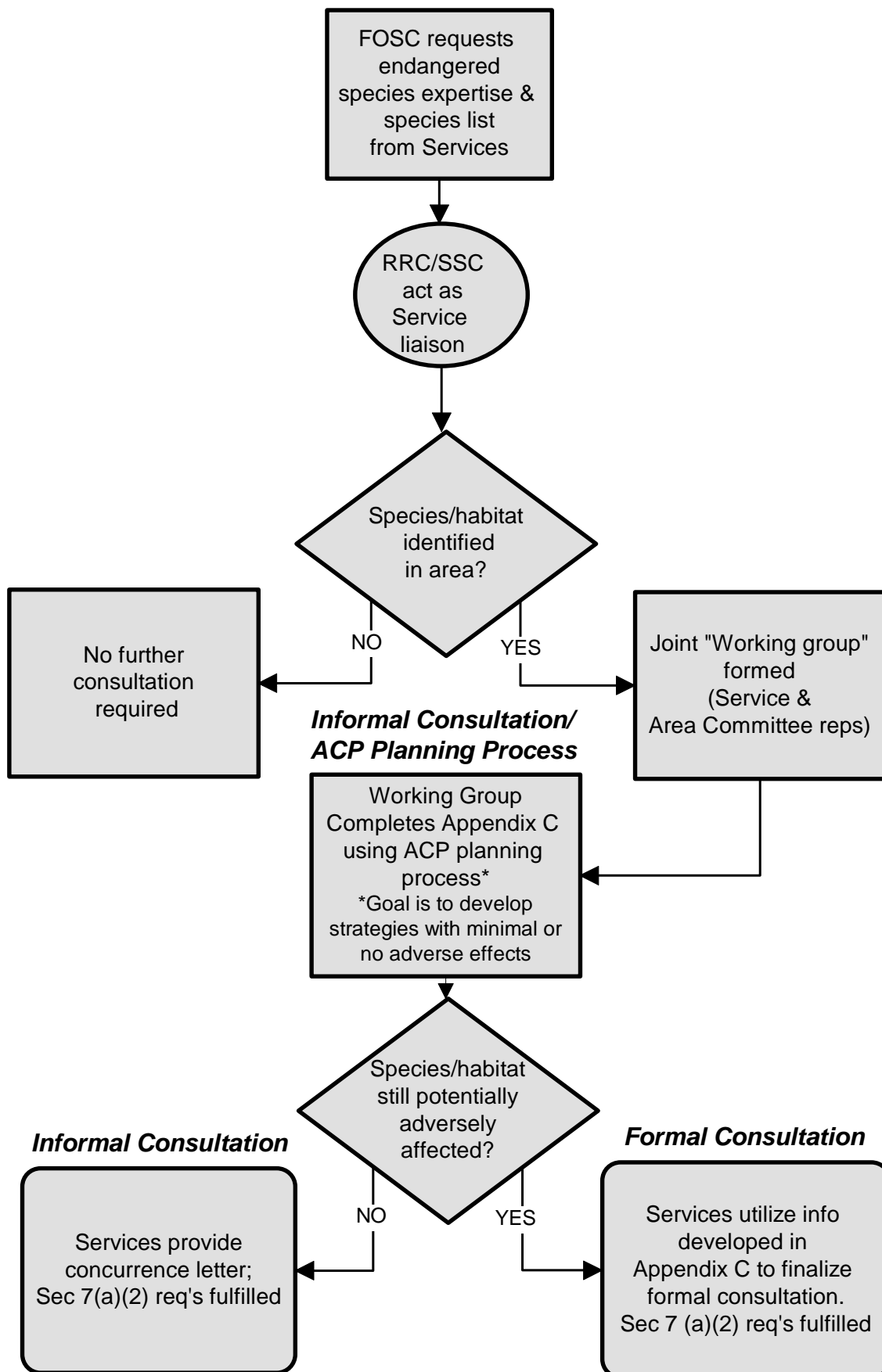

for Assistant Administrator
National Ocean Service
National Oceanic and Atmospheric Administration

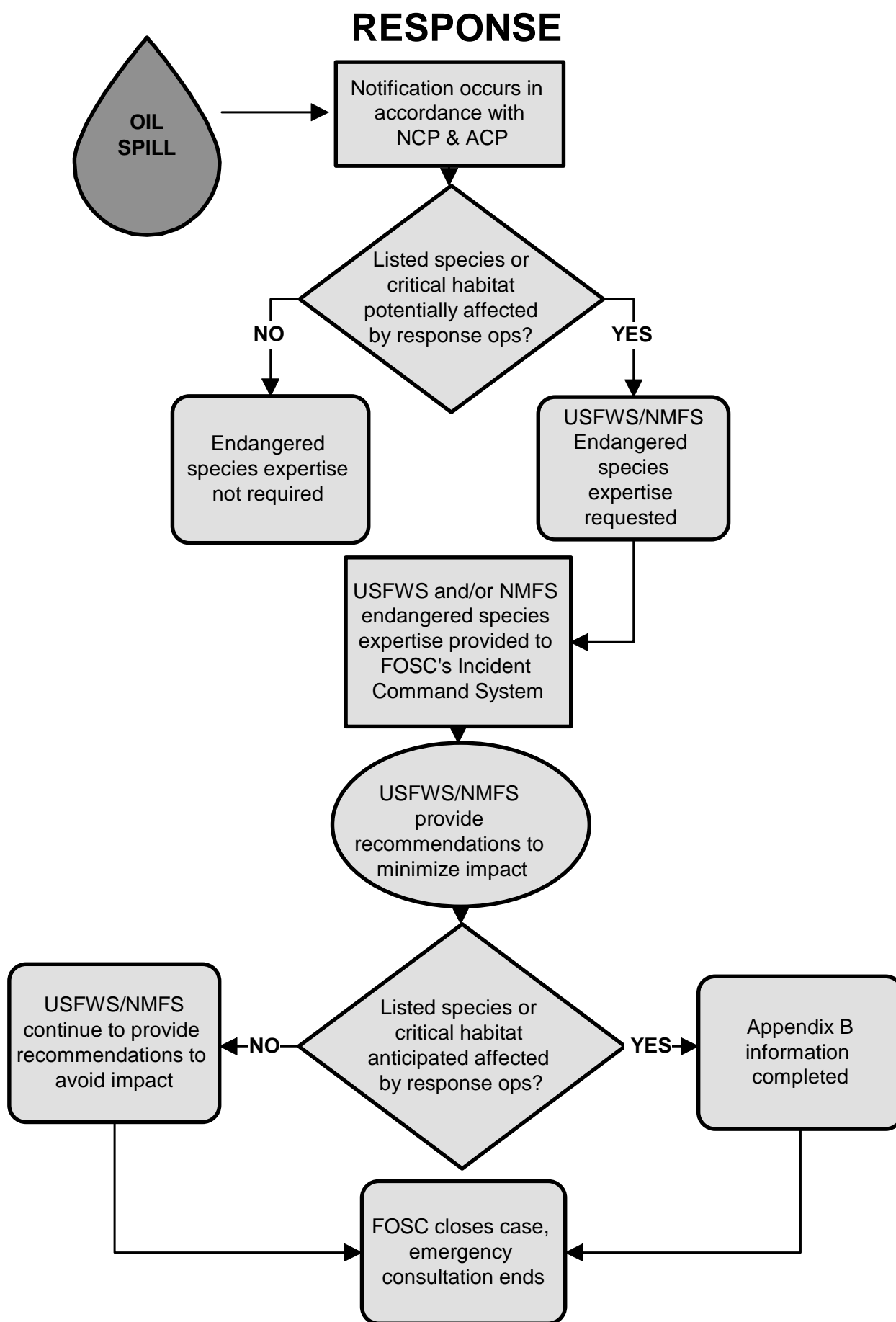
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Director
Office of Environmental Policy and Compliance
Department of the Interior

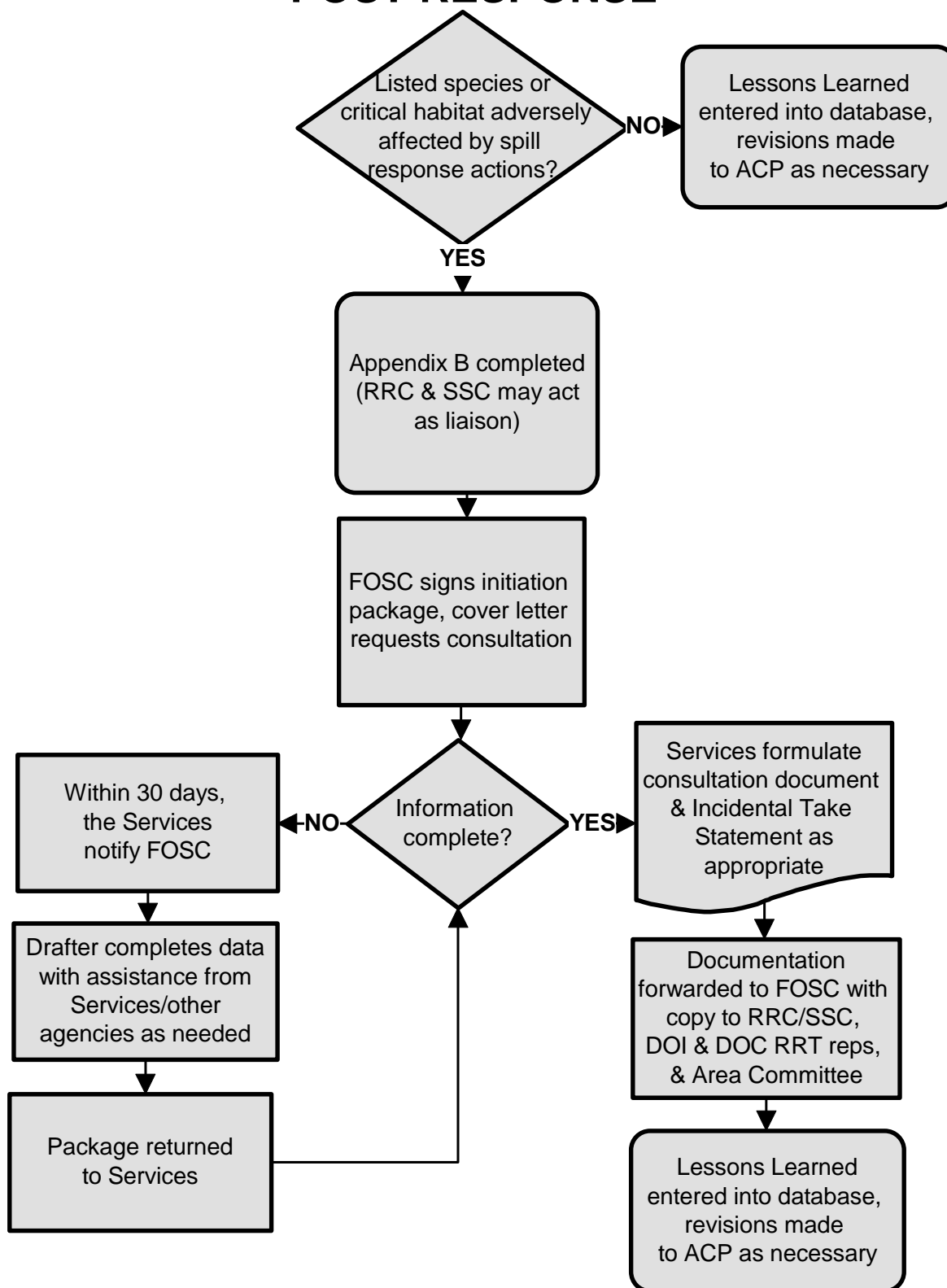
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PRE-SPILL PLANNING





POST RESPONSE



APPENDIX B**EMERGENCY CONSULTATION
INFORMATION CHECKLIST IN ANTICIPATION OF FOLLOW-UP FORMAL CONSULTATION (50
CFR 402.05)**

As soon as practicable after the emergency is under control, which occurs when the case is closed, the FOSC initiates consultation (either formal or informal, as appropriate) with the Services if listed species and/or critical habitat have been affected. The FOSC should ensure that the following checklist is completed before the case is closed. After the case is closed, this information along with a cover letter requesting consultation will be sent to the Services.

1. Provide a description of the emergency (the oil spill response).
2. Provide an evaluation of the emergency response actions and their impacts on listed species and their habitats, including documentation of how the Services' recommendations were implemented, and the results of implementation in minimizing take.
3. Provide a comparison of the emergency response actions as described in #2 above with the pre-planned countermeasures and information in the ACP.

APPENDIX C

PLANNING TEMPLATE

One of the goals of the Area Contingency Plan (ACP) planning process is to develop strategies or actions that reduce the potential for planned oil spill response activities to adversely affect listed species and designated critical habitat. The planning process may also develop strategies that purposefully protect these resources. The following template is recommended for use by a working group of both Service and Area Committee representatives to develop a document that 1) is used to complete consultation pursuant to Section 7 (a)(2) of the Endangered Species Act of 1973, as amended, and 2) produces information to be included in the appropriate sections of the ACP. To streamline the consultation process, the various sections of this document could be drafted during the planning process and used to develop or modify the ACP.¹⁹ This development process will assist all parties in gaining a thorough understanding of the actions under review and provide opportunities for any Section 7 consultation related issues to be raised and addressed in the planning process, rather than during the oil spill response action.

This template is intended to guide the thought process of creating consultation documents and incorporates content requirements set forth in 50 CFR 402.12 as well as information pertinent to the National Contingency Plan requirements under the Fish and Wildlife Annex; not every item will be applicable to every situation.²⁰

Introduction

This section generally should be completed in one, or possibly two paragraphs.

- General overview of the response strategy including: (1) a brief description - one to two sentences; (2) background, history, etc. as appropriate; (3) purpose of the response strategy; (4) identification of the species and designated critical habitat that may be affected (for consultations that will address large numbers of species, it may be desirable to present this list in the form of a table either attached or presented in another section. Also, if species that may potentially occur in the area are not included in this document, explain why).

This should be developed jointly by the action agency and the Services.

Description of the Proposed Response Strategy

- Provide a description of the response strategy being considered. This is likely to be a detailed description taken substantially from the ACP. It should include how the

¹⁹ It is not required that this planning template be formally written or completed during informal consultation, especially if no modifications to the strategy are required. However, it can be very useful in documenting the [team's] thought process for the administrative record, serving as a guide, or providing additional documentation as needed.

²⁰ The guide on "Developing Consensus Ecological Risk Assessments" provides procedures which may be helpful in exploring and analyzing these issues. Copies can be obtained from USCG Headquarters (G-MOR-2).

response action will be implemented, including equipment and methods. Examples include use of dispersants to avoid shoreline impacts, and deployment of booms to protect sensitive areas. Include all known aspects of the action, such as time frames, why the action is appropriate, indirect effects, etc. An example of an indirect effect may be hauling boom on, or driving vehicles through, a sensitive dune area to gain access to a spill site.

This should be developed by the action agency with the assistance of the Services.

- Provide a description of specific area that may be affected by the response strategy (i.e. Sample Bay, 100-mile section of outer coastline, etc.). Include some measure of the area potentially impacted (i.e., “This plan addresses oil spill response activities that may be conducted out two miles from the coast throughout the 100 mile coastline area encompassed by this ACP”). If different activities are being proposed in different areas, identify this. The team should discuss the appropriateness of presenting this information in terms of the activities that will be conducted within each area, or the areas where each activity will be conducted. For example, “Dispersants may be applied throughout the 10 mile coastline length of Area A and the 25 mile coastline length of Area B.” Maps may be useful.

This should be developed mainly by the action agency; however, modifications may be made with the assistance of the Services and subject to the approval process for chemical countermeasures in the NCP as appropriate.

- Identify how to quickly obtain species/habitat information during a spill (i.e. first refer to ACP and site summary sheet, call State FWS, check website, etc.).

This should be developed jointly by the action agency and the Services.

- Identify emergency response points of contact to be notified during a spill. Establish spill parameters for notification as necessary. These should be included in emergency

notification numbers as well as on any site summary sheets, in geographic response plans, etc.

This should be developed jointly by the action agency and the Services.

Description of the Affected Environment

- Describe the listed species and designated critical habitat areas that may be affected by the action in terms of overall range and population status. Include the number and location of known subpopulations within and adjacent to the action area (i.e., identify the areas known to be used by the species and, if appropriate, identify the specific times periods of use, such as February - April). Discuss the action area in relation to the distribution of the entire population (e.g., edge of the range, center of population abundance, key reproductive area, etc.). Present views of Service recognized experts on the species, if appropriate.

This should be provided by the Services.

- Ensure that these sensitive areas are referenced in the ACP (i.e. via ESI maps, specially generated GIS maps, site summary sheets, or other digitized format, etc.).

This should be completed by the action agency.

- Provide biological data on listed species: historical use, presence, and potential use of habitat areas within the action area. Literature and other documents containing such information may be incorporated by reference. Provide species observation information, and recent results of species surveys, including, if appropriate, a description of methods, time of year surveys were performed, level of effort, and confidence intervals. Again, literature and other documents containing such information may be incorporated by reference. Maps may be useful to depict this information.

The Services should assist in developing this information. In many instances the Services will be able to supply this information from their records.

- Identify other designated sensitive areas, both adjacent to and within the proposed action area. These include National Wildlife Refuges, National Marine Sanctuaries, etc.

This should be developed jointly by the action agency and the Services.

Analysis of the Effects of the Action

- Describe all effects of the response strategy relative to the listed species of concern and its habitat, including designated critical habitat. This should include direct, indirect, beneficial, and cumulative effects as well as effects from interrelated and interdependent actions, if any.

This should be developed jointly by the action agency and the Services.

- Describe any measures that may avoid or lessen adverse effects as well as any measures that will enhance the species' present condition. If appropriate, delineate the locations of such measures. A discussion of environmental "tradeoffs" (including no action) may be appropriate. For example, "Dispersants may be toxic to the listed aquatic species when used in concentrations above 70%; however, oil coming ashore and smothering the listed species in tidal marshes is of greater concern due to the extremely poor conservation status of this species." Reference any already completed relevant reports, studies, biological assessments, etc.

This should be developed jointly by the action agency and the Services.

Modification to Strategy (as needed)

If necessary, after joint analysis of the information, the action or strategy may be modified.

- Describe the new strategy or action. For example, "Dispersants will not be used in concentrations above X% or in areas less than three feet deep. They may be used in Area A and Area B. A Service representative from Regional

field office B will be contacted during an oil spill response during the months of February - April in Area B.”

This should be developed jointly by the action agency and the Services.

Documentation

This template is a guide to help you through the planning process, however, when sections are written out as the process is completed, the final document serves the same purpose as a biological assessment. It may be used to complete consultation pursuant to Section 7 of the ESA.

- The document should be maintained on file by the Services and may be referred to during an oil spill response.
- The Area Committee will ensure that this document becomes part of the ACP as appropriate such as:
 - Included as an appendix to the Dispersant or In Situ Burn Operations Plan;
 - Included as a reference document in the appropriate section of the ACP;
 - Include relevant information in sections of the ACP such as Notifications, Site Summary Sheets, Geographic Response Plans, GIS maps, etc.
- The document should include points of contact from both the action agency and the Services.

APPENDIX D

SAMPLE POLLUTION REMOVAL FUND AUTHORIZATION (PRFA) LANGUAGE*

This Statement of Work (SOW) language is intended as sample language only. The language can be tailored to ensure that the FOSC is provided with the resources needed to meet the desired activities or functions required. Accordingly, more precise or succinct language may be used.

PRFA SOW additional/optional work elements to meet the FOSC's ESA mandated activities associated with removal actions:

.....

To arrange for, and as appropriate coordinate with, the resources needed to meet the conference and consultation requirements of the ESA.

Specific activities anticipated under this requirement include:

- (a) Providing the expertise needed to make sensitive removal decisions which could potentially impact on listed species or critical habitats associated with this incident;
- (b) Gathering and documenting the information needed to provide input into the aforementioned decisions and to document the resulting impact of removal actions; and
- (c) As required, preparing the consultations required of the FOSC for the Service(s).

Funding under this agreement is provided for:

- (a) Salaries, travel and per diem;
- (b) Appropriate charges for use of equipment or facilities;
- (c) Any actual expenses for goods and/or services reasonably obtained in order to provide the agreed upon support to the FOSC removal activities (including contracts.)

* Developed by the National Pollution Funds Center

APPENDIX E

SAMPLE LETTERS FOR REQUESTING CONCURRENCE OR FORMAL CONSULTATION

These sample letters have been developed to assist the Parties to this agreement in documenting the requirements of the Endangered Species Act. This is suggested wording only and may be used to complete the administrative record as needed. The request for concurrence can be used after the planning process for a particular area or countermeasure when it has been determined that no adverse effects will occur. The Services will provide a concurrence letter, as appropriate, for documentation. Alternatively, the request for formal consultation can be used after planning results indicate that adverse effects may still occur. If this is the case, the Services will evaluate the information developed jointly by the workgroup and issue a biological opinion.

Request for Concurrence Letter:

Mr./Ms. xxx
U.S. Fish and Wildlife Service/National Marine Fisheries Service
Division of Endangered Species

Dear Mr./Ms. xxx:

In accordance with the requirements of Section 7 of the Endangered Species Act, I am seeking your concurrence that the [Coast Guard's/EPA's] implementation of the [name of plan] is not likely to adversely affect the [identify the listed species and designated critical habitat that may be affected. Note, in cases where many listed species or critical habitat designations may be involved, it may be appropriate to refer to an attached list]. This [name of plan] has been developed with the assistance of [name of Service staff] of the U.S. Fish and Wildlife Service/National Marine Fisheries Service and in accordance with the procedures identified at 40 CFR Part 300, the National Contingency Plan. To assist in completing informal consultation, please find attached the Biological Evaluation that has been produced through the planning process described in the Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act using the Planning Template contained in Appendix C of that Agreement.

Thank you for your efforts in this matter. If you require additional information, please contact [provide a contact with a telephone number].

Sincerely,

Request for formal consultation:

Mr./Ms. xxx:
 U.S. Fish and Wildlife Service/National Marine Fisheries Service
 Division of Endangered Species

Dear Mr./Ms. xxx:

In accordance with the requirements of Section 7 of the Endangered Species Act, I am requesting the initiation of Formal Consultation on the effects of the [Coast Guard's/EPA's] implementation of the [name of plan]. Through informal consultation with your staff [or identify the appropriate Service office(s)], we have determined that implementation of spill response activities in accordance with the subject [name of plan] is likely to result in adverse effects to [identify the listed species and designated critical habitat that may be affected. Note, in cases where many listed species or critical habitat designations may be involved, it may be appropriate to refer to an attached list]. This [name of plan] has been developed with the assistance of [name of Service staff] of the U.S. Fish and Wildlife Service/National Marine Fisheries Service and in accordance with the procedures identified at 40 CFR Part 300, the National Contingency Plan. While these actions may result in short-term adverse effects, it is our belief that the species [and designated critical habitat areas] will ultimately benefit from them. To assist in completing Formal Consultation, please find attached the Biological Evaluation that has been produced through the planning process described in the Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act using the Planning Template contained in Appendix C of that Agreement.

Thank you for your efforts in this matter. If you require additional information, please contact [provide a contact with a telephone number].

Sincerely,